



UNIVERSITY OF CAPE TOWN

**THE ROLE OF *JUS COGENS* IN RESOLVING THE INTER-  
TEMPORAL PROBLEM IN *MAU MAU* TORTURE CLAIMS AND  
OTHER HISTORICAL INJUSTICES: A THEORETICAL  
EXPLORATION**

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Research dissertation presented for the approval of the senate in partial fulfillment of the requirements for the degree in Masters in International Law in approved courses and minor dissertation.

I hereby declare that I have read and understood the regulations governing the submission of a dissertation for a masters in Law, including those relating to length and plagiarism, as contained in the rules of this University, and that the dissertation conforms to those regulations.

**Cape Town, January 2015**

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## ABSTRACT

The Chief obstacle in the resolution of historical injustices in international law is the inter-temporal question, summarized as the requirement that positive substantive international law, as it stood at the time in which an injustice occurred, ought always to apply over latter laws. *Jus cogens*, being largely independent from positive international law, offers a possible resolution to this problem: a possibility that this thesis explores using *Mau Mau* torture claims as a case study.

Present in much legal opinion on the question is a presumption that inter-temporal law applies unless state practice justifying an exception for *jus cogens* can be found. However, this necessarily subjects *jus cogens* to inter-temporality and contradicts the standard meaning of *jus cogens* and its superior status in the entire legal framework of international law. It is argued in this paper that the superiority of *jus cogens* in international law should be reflected in the application of the inter-temporal principle, as indeed it should in the application of all other inferior norms and principles wherever relevant subject matter is in issue.

After the introduction in chapter one, the above-described problem in the scholarly approach to inter-temporal law and *jus cogens* is highlighted in chapters two and three, wherein an apparent normative conflict between *jus cogens* and inter-temporal law is demonstrated. But if *jus cogens* norms begin at an identifiable point in time and are prospective in nature, no over-lap and thus no contradiction can be spoken of where the matter occurred before the emergence of these norms, a problem tackled in chapter four. Difficulties in the standard definition of *jus cogens* found in article 53 of the Vienna Convention on the Law of Treaties are also discussed along with an argument for an unlimited temporal scope of application for ‘humanitarian’ peremptory norms. Lastly, chapter five approaches the problem through the prism of a balancing scale of competing interests. In short, this thesis argues that there is no threat to justice, law or truth in applying ‘humanitarian’ peremptory norms to old injustices in the area of state responsibility.

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## **LIST OF ABBREVIATIONS**

CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
FCO	Foreign and Commonwealth Office
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
IHL	International Humanitarian Law
ILC	International Law Commission
ILR	International Law Reports
NATO	North Atlantic Treaty Organization
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties

## INTERNATIONAL CONVENTIONS AND OTHER INTERNATIONAL AND FOREIGN LEGAL INSTRUMENTS

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## CHAPTER ONE: INTRODUCTION

### I. Background: *Mau Mau* claims, torture and international law

#### a) *Mau Mau* claims

The *Mau Mau* claims of torture at the hands of British colonial officers in colonial Kenya during the so-called emergency period (20<sup>th</sup> October, 1952 to 12<sup>th</sup> January, 1960<sup>1</sup>) have been the subject of two separate legal actions in recent years. The first one succeeded at the preliminary stages of the trial<sup>2</sup> but never went to full hearing. Instead, an out-of-court settlement was made with the British government on behalf of 5,228 claimants.<sup>3</sup> This settlement consisted of an acknowledgment by the government of Great Britain that acts of torture and gross violations of the claimants' human rights occurred during the emergency period, an expression of regret (but no formal apology, nor admission of liability) and a rather small sum of money paid in compensation.<sup>4</sup>

Unsatisfied with the outcome of the first suit and perhaps buoyed by its success at the preliminary stages in the High Court in London, seven British firms have recently lodged a fresh suit in the London High Court in October, 2014,<sup>5</sup> this time representing over 40,000 claimants. The suit concerns a variety of acts constituting human rights violations including: torture, cruel, inhuman and degrading punishment, forced labor and even the denial of the right to education. These are alleged to have been perpetrated on the

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<sup>1</sup> David A, 2005, *Histories of the Hanged: The Dirty War in Kenya and the End of Empire* at 390, 393.

<sup>2</sup> *Ndiki Mutua & others -v- The Foreign and Commonwealth* [2011] EWHC 1913 (QB); and *Ndiki Mutua & others -v- The Foreign and Commonwealth Office* [2012] EWHC 2678 (QB) Case No: HQ09X02666 High Court (Queen's Bench Division) 5 October 2012.

<sup>3</sup> Statement to Parliament on settlement of *Mau Mau* claims by Foreign Secretary, The Rt. Hon. William Hague MP, Parliamentary Debates (Commons) 6<sup>th</sup> June, 2013.

<https://www.gov.uk/government/news/statement-to-parliament-on-settlement-of-mau-mau-claims>

<sup>4</sup> £19.9 million for all 5, 228 claimants amounted to about £3,800 per claimant.

<sup>5</sup> Reported on 'The Guardian' Newspaper on 29<sup>th</sup> October, 2014,

<http://www.theguardian.com/world/2014/oct/29/kenya-mau-mau-abuse-case>

claimants in the emergency period.<sup>6</sup> However, it is torture that this paper focusses on, owing to its established peremptory status in modern international law.

## b) Torture

Caroline Elkins summarizes the acts of torture that occurred in Kenya in the early 1950s thus,

“Electric shock was widely used, as well as cigarettes and fire. Bottles (often broken), gun barrels, knives, snakes, vermin, and hot eggs were thrust up men's rectums and women's vaginas. The screening teams whipped, shot, burned and mutilated *Mau Mau* suspects, ostensibly to gather intelligence for military operations and as court evidence.”<sup>7</sup>

And from Malcolm Coxall,

“A number of male victims suffered from castration, women suffered from horrendous sexual abuse, many thousands of *Mau Mau* members were beaten, tortured and killed.”<sup>8</sup>

Indeed, the *Mau Mau* torture claims have the strange “advantage” of constituting acts so horrendous that they cannot reasonably fail to meet the threshold of acts considered to be torture. According to Michael J. Garcia’s report to the United States Congress on torture, the meaning of “torture” in the Convention against Torture (CAT)<sup>9</sup> includes more than poor treatment while in the custody of governmental officers.<sup>10</sup> The acts must go beyond “rough treatment” that amounts only to police brutality, which, “while deplorable, does

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<sup>6</sup> *Ibid.*

<sup>7</sup> Elkins, C (2005) *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya*, at 66.

<sup>8</sup> Coxall, M (2013) *Human Manipulation - A Handbook*, para 12.2.

<sup>9</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

<sup>10</sup> Garcia MJ, *U. N. Convention against Torture (CAT): Overview and Application to Interrogation Techniques*, for U.S. Library of Congress, CRS Report RL32438 (Washington, DC: Office of Congressional Information and Publishing, January 26, 2009), at 2.

not amount to torture for purposes of the Convention”.<sup>11</sup> Torture is thus understood as involving extreme actions, including “systematic beating, electric shock applied to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.”<sup>12</sup> The fact that CAT’s article 16 requires states to abstain from “inhuman or cruel acts that do not amount to torture” is also taken as proof for the position that not all inhuman treatment automatically qualifies as torture: These are listed separately from torture in the convention and prohibited in their own terms.<sup>13</sup>

Certainly, the acts described by Elkins and Coxall above go beyond mere “rough treatment.” Indeed, while the threshold for torture is still a matter of debate in international law, no one could seriously doubt that the acts allegedly perpetrated on *Mau Mau* detainees qualify. Moreover, the facts were generally admitted by the British Government through its Foreign and Commonwealth Office (FCO), though liability for them in British Municipal law and International law is adamantly denied.

The *Mau Mau* claims also have the “advantage” that they occurred relatively recently. Many of the victims or their immediate relations are still alive. Thus, the claims escape the problem of linking present injury to past injustices that in many ways seriously hinders reparations claims based on historical injustices—usually from both a legal and moral stand-point. In fact, the events of the *Mau Mau* claims happened in the early part of the ‘human rights era’ shortly after the end of the Second World War, when instruments of foundational importance in Human Rights Law were drafted and adopted, namely: the UN Charter (1945),<sup>14</sup> The Genocide Convention (1948),<sup>15</sup> The Universal Declaration of Human Rights (1948),<sup>16</sup> The Geneva Conventions (1949)<sup>17</sup> and The European Convention on Human Rights (1950).<sup>18</sup>

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<sup>11</sup> *Ibid*, citing President Reagan’s address to the U.S. Senate on debates regarding American ratification of the Convention.

<sup>12</sup> *Ibid*.

<sup>13</sup> *Ibid*.

<sup>14</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>15</sup> UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277.

<sup>16</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

c) Torture in modern and past international law

Regardless of the above “strengths” of the *Mau Mau* claims, they share the common handicap of claims based on historical injustices in that they occurred before the law on torture had developed into a clearly recognizable and universally binding prohibition of the abuses that the victims suffered. In fact, when the worst of the atrocities took place (the period between October, 1952 and June, 1953<sup>19</sup>) there were only two international treaties that had explicit provisions against torture: the 1949 Geneva Conventions and the European Convention of Human Rights (ECHR). Regrettably, the ECHR would only come into force on 3<sup>rd</sup> September, 1953, while Britain ratified the Geneva Conventions in 1957, well after the atrocities.

The prohibition of torture had become a universally binding norm of international law at least by *Filartiga vs Pena- Irala* (1980)<sup>20</sup> when the American Appeals Court declared that:

“....official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens.”<sup>21</sup>

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<sup>17</sup> International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31; International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85; International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135; International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.

<sup>18</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

<sup>19</sup> Bennett, H (2012) *Fighting the Mau Mau: The British Army and Counter-Insurgency in the Kenya Emergency*, Cambridge University Press, 81.

<sup>20</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d. Cir. 1980), hereinafter *Filartiga* or *Filartiga case*.

<sup>21</sup> *Ibid*.



This prohibition was explicitly stated in several international instruments of widespread application<sup>22</sup> and in the municipal laws of 55 nations.<sup>23</sup> Conversely, laws permitting governments to employ torture as a device in investigations and other situations had disappeared from virtually all the municipal systems that had previously had them.<sup>24</sup> Moreover, there was overwhelming evidence of the near universal *opinio juris* of states regarding this rule in their public statements.<sup>25</sup> While it was beyond dispute that many of these same states regularly employed the use of torture in practice, none of them publicly admitted to it or defended the practice.<sup>26</sup> This latter “practice”, therefore, despite its fairly extensive application, was to be construed as a violation of the norm rather than as evidence of a custom permitting governments to practice torture.<sup>27</sup>

However, the situation in the 1950s was quite different. As seen in the reference to the late coming-into-force of the 1949 Geneva Conventions and the ECHR above, the UDHR was the only “operative” instrument that clearly prohibited torture during the time of the *Mau Mau* tortures. It declared,

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>28</sup>

By itself, however, the declaration could not be considered binding until it had been “gradually justified by state practice.”<sup>29</sup> In fact, Bennett notes that this confirming practice did not exist during the emergency period.<sup>30</sup> Thus, international customary law could not have been relied upon at the time to claim a breach of international law, either.

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<sup>22</sup> CAT; UDHR (article 3); Geneva Conventions (Common article 3); ECHR (article 5); UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 (article 7) (ICCPR).

<sup>23</sup> *Filartiga case*.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> UDHR, article 3.

<sup>29</sup> *Filartiga case*.

<sup>30</sup> Bennett, at 77.

Common article 3 of the 1949 Geneva Conventions in its turn protects

“persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause.”<sup>31</sup>

These persons must always be treated “humanely”.<sup>32</sup> The article further prohibits such acts as: “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture,”<sup>33</sup> as well as “outrages upon personal dignity, in particular humiliating and degrading treatment.”<sup>34</sup> In addition, it requires that the wounded and sick “be collected and cared for.”<sup>35</sup>

Clearly, the kinds of acts perpetrated against *Mau Mau* suspects and prisoners would’ve been prohibited by the language of common article 3. Unfortunately, as indicated above, the Geneva Conventions came into force for Britain rather late. It also appears that the Geneva Conventions would not have afforded much legal protection to the *Mau Mau* anyway, as a wide consensus among experts has concluded that it is extremely difficult to establish with any confidence that the *Mau Mau* rebellion amounted to an “armed conflict” that would have triggered the application of Common Article 3.<sup>36</sup> Similarly unfortunately, the European Convention whose article 5 also prohibits torture suffers the same disabilities as the Geneva Conventions as far as the *Mau Mau* cases are concerned.

But might other aspects of the law offer relief from these temporal difficulties?

### **“Objects and purposes” of treaties**

The VCLT provides,

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<sup>31</sup> Geneva Conventions, Common Article 3 (1)

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, article 3 (1) (a).

<sup>34</sup> *Ibid.*, article 3 (1) (c).

<sup>35</sup> *Ibid.*, article 3 (2).

<sup>36</sup> Bennett, at 79.

“A State is obliged to *refrain from acts which would defeat the object and purpose of a treaty* when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”<sup>37</sup>

Thus, the question must be asked if by virtue of this principle, the obligations of the above-discussed conventions would apply to the *Mau Mau* tortures despite their late entry into force. In fact, the VCLT itself, adopted much later than any of these conventions, is not retroactive in application.<sup>38</sup> However, might it reflect a rule of customary international law relevant to the 1950s? Bennett appears to think so.<sup>39</sup> According to him, this rule of custom obliges the state party to act “in the spirit” of a convention after becoming signatory thereto.<sup>40</sup> He explains regarding the Geneva Conventions in particular, that “the spirit” of these Conventions excludes Common Article 3—the only protection for victims of non-international armed conflicts in the Geneva Conventions. For him, “the spirit” of this convention is the regulation of inter-state conflict, to which common article 3 has no application.<sup>41</sup>

However, the ICTR trial chamber said in *The Prosecutor vs Akayesu*,

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<sup>37</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, article 18.

<sup>38</sup> *Ibid.*, article 4.

<sup>39</sup> Bennett, at 79.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

“The four Geneva Conventions – as well as the two Additional Protocols – as stated above, were adopted *primarily to protect the victims as well as potential victims of armed conflicts.*”<sup>42</sup>

It seems that the aims of common article 3 accord perfectly with the general aims of the Geneva Conventions as a whole. In fact, when it comes to human rights and humanitarian instruments in general, just where “the spirit” ends and the explicit obligation begins seems an impossible distinction to make. The object of the ECHR, for example, is no more nor less than to protect and insure human rights.<sup>43</sup> It does not seem possible to argue that violations of basic human rights such as were committed by British colonial officers could possibly accord to the spirit of a Human rights treaty that forbids torture, however one may construe that “spirit.” To the contrary, it seems fair to conclude that Britain’s duty to act “in the spirit” of the European and Geneva Conventions (were the Geneva Conventions applicable) no doubt would have included a duty to refrain from committing such acts as *Mau Mau* detainees were subjected to.

However, Hollis says that the extent to which the above-referenced article 18 reflects customary law is controversial.<sup>44</sup> Indeed, many scholars are of the opinion that at the time of the adoption of the VCLT, that rule did not reflect established practice but rather a development of the law.<sup>45</sup> That being the case, there could not have been a breach of that rule during the emergency period. Moreover, even if Britain had such a duty at that time, it would be a duty held under the law of treaties itself. This is a duty vis-à-vis other state parties to conventions whose object Britain’s acts may be alleged to have frustrated. It is not a duty owed to individuals. Nor can Kenya as a state act for its nationals for the obvious reason that it is not a state-party to the ECHR and thus lacks *locus standi*.

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<sup>42</sup> *The Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998.

<sup>43</sup> The ECHR preamble, “Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared”.

<sup>44</sup> Duncan BH (2001) *The Oxford Guide to Treaties*, Oxford University Press, 212.

<sup>45</sup> *Ibid*, quoting Rosenne in (1989) *Developments in the Law of Treaties, 1945-1986* (CUP, Cambridge, 149).

## Continuing violations

An exception to the limits of the jurisdiction of the European Court of Human Rights (ECtHR) *ratione temporis* are cases originating before the entry into force of the ECHR and persisting thereafter. These are different from “instantaneous facts”,<sup>46</sup> which cease before that critical date. While the emergency continued long after 1953, as seen above, torture was not part of it thereafter. Unlike disappearances or continued denial of access to property, the nature of torture and other forms of violence is that they last only as long as the acts inducing the suffering continue. However, considering the treatment of Jewish holocaust victims as a single collective for purposes of reparation,<sup>47</sup> can the *Mau Mau* be regarded as part of a collective, thus, enabling the tortures to be taken into account as aspects of continuous violations of the human rights of a people? Unfortunately for the claimants, there is no evidence that the *Mau Mau* were targeted on the basis of their ethnicity<sup>48</sup> rather than their insurgency.

## Territorial limitations

It must also be stated that in addition to the temporal limitations discussed above, there is also a territorial limitation. In the ECHR regime, unless a state has made a declaration under article 56 extending application of the Convention to its dependant territories, the application will be incompatible *ratione loci*.<sup>49</sup> Common article 1 of the Geneva

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<sup>46</sup> Council of Europe: European Court of Human Rights, *Practical Guide on Admissibility Criteria*, 2011, at 41, available at [www.echr.coe.int](http://www.echr.coe.int)

<sup>47</sup> Barkan E (2001) *The Guilt of Nations: Restitution and Negotiating Historical Injustices*, at 5—6.

<sup>48</sup> McVay K ‘Self-Determination in New Contexts: The Self-Determination of Refugees and Forced Migrants in International Law’ (2012) 28 *Merkourios Journal of International and European Law* 36, at 37; Ethnicity is among the traditional bases for defining “peoples” in international law.

<sup>49</sup> Admissibility Guide, at 39. Also, *Gillow v United Kingdom* (1986) 11 EHRR 335; *Bui Van Thanh and Others v. the United Kingdom* (Appl. no. 16137/90) Eur Comm’n HR 12 March 1990, 65 DR (1990) 330.

Conventions, on the other hand, is understood as providing for universal application of the conventions<sup>50</sup> but as discussed above, the four conventions are limited in other ways.

### **What about the UN Charter?**

The human rights obligations of the UN Charter are not so clear. The precise language of the Charter is “promoting and encouraging respect for human rights and for fundamental freedoms for all.”<sup>51</sup> Nevertheless, the American Appeals Court in *Filartiga* above explained that UN declarations specify “with great precision” the obligations of member-states of the UN under the UN Charter.<sup>52</sup> Thus, the UDHR can be understood as enunciating those “human rights and fundamental freedoms” that states have pledged to promote in the UN Charter, such that they may not claim ignorance of the specifics of their Charter obligations regarding human rights and fundamental freedoms.<sup>53</sup> Indeed, that court concluded that while these rights and freedoms remained undefined in 1980, they included “at the very least, the right to be free from torture.”<sup>54</sup>

It is thus possible to argue that throughout the 1950s, Britain had a charter obligation to promote and encourage respect for the human right to be free from torture. Like the mandate system, this would seem to be a duty entailing common interests and no reciprocal rights on the part of the state-parties besides the right of enforcement. The question of “legal interests” and its relation to *locus standi* that the international court introduced in the *South West Africa case*<sup>55</sup> would not pose a problem to Kenya, as a state

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<sup>50</sup> Chazournes LB & Condorelli L ‘Common Article 1 of the Geneva Conventions revisited: Protecting collective interests’ (2000) *International Review of the Red Cross*, No. 837, available at <https://www.icrc.org/eng/resources/documents/misc/57jqcp.htm>

<sup>51</sup> UN Charter, article 1 (3). Article 55 refers to this as a duty of the UN as an organization, while in article 56 member-states pledge themselves to co-operate with the organization in achievement of its purposes. Human rights and fundamental freedoms are also referred to with reference to the duties/purposes of the General Assembly in article 13 (1) (b); ECOSOC in article 62 (2) and the International Trusteeship System in article 76 (c).

<sup>52</sup> *Filartiga Case*.

<sup>53</sup> *Ibid*.

<sup>54</sup> *Ibid*.

<sup>55</sup> *South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa)*; *Second Phase*, International Court of Justice (ICJ), 18 July 1966.

clearly has an interest where its own nationals are concerned. Regardless, the fact that the UDHR was not considered binding at the time poses a challenge to this approach.

In summary, it appears that positive substantive international law does not offer a sure basis for founding legal claims on the tortures that occurred during the Kenyan emergency period.

## II. The statement of the problem

The above-described situation is symptomatic of claims based on historical injustices in general. While causes for reparation of historical injustices have sometimes led to restitution, compensation or apology, they have generally met with little success.<sup>56</sup> In some countries, municipal law has been developed to accommodate the claims out of a sense of moral obligation or political responsibility.<sup>57</sup> Sometimes, solutions have been found in creative reinterpretations of national laws in light of present day human rights values.<sup>58</sup> On the international level, yet other claims have been resolved through a simple, direct, voluntary assumption of the duty to pay reparation for past wrongs unaccompanied by legislative changes or creative judicial reinterpretation of laws. But where municipal solutions are not available and the concerned government remains unwilling to pay for reparations, the prevailing view among scholars is that few claims, if any, can succeed on the basis of substantive international law.

Thus, the call for redress of past wrongs is seen as constituting primarily *moral* claims—serious claims to be sure, engaging the grave political responsibility on the part of the

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<sup>56</sup> Shelton D 'The World of Atonement Reparations for Historical Injustices' (2004) 1 *Miskolc Journal of International Law*, *Miskolci Nemzetközi Jog Közlönyek*, 2, 259-289, at 266—268.

<sup>57</sup> For example, the enactment of the Civil Liberties Act of 1988 (Pub.L. 100–383, title I, August 10, 1988, 102 Stat. 904, 50a U.S.C. 1989b); Enacted by the American Government to accommodate Japanese-Americans interned during World War II.

<sup>58</sup> In *Mabo v Queensland (No 2)* ("Mabo case") [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992), the Australian High Court refused to apply discriminatory theories of sovereignty in the 18<sup>th</sup> century that had the effect of dispossessing the *Meriam* people of ownership of their land and interpreted the past law without the past theories of sovereignty.

“guilty”<sup>59</sup> states, although they remain non-legal claims. Thus, Du Plessis describes the claims as “political strategizing and moral argument in the pursuit of justice”.<sup>60</sup> Indeed, the moral argument for reparation is unassailable, as Du Plessis puts it.<sup>61</sup> It is translating this argument into a legal claim within the present system that presents a challenge.

Besides the problems with substantive international law itself, as seen above, other challenges involve: difficulties in finding a proper forum, establishing *locus standi* (that is, finding a proper—and willing—claimant where the forum does not admit individual claims) and determining the appropriate manner of reparation (How does one quantify violations of peremptory norms?). However, this paper focusses on the question of substantive law. Given that many injustices are “historical” precisely because they pre-exist relevant modern instruments and customs, how does one establish a legal wrong, for which reparation is due on the basis of something more than mere goodwill of “guilty” states? In other words, how does one solve the problem of inter-temporal law?

a) Inter-temporal law

Max Huber explained in the *Island of Palmas case* that,

“a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.”<sup>62</sup>

This is the principle of inter-temporal law, variously called “contemporaneity” or “non-retroactivity” of law. It is the principle by which matters implicating several temporal

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<sup>59</sup> Barkan’s “*Guilt of Nations*” uses “guilty” rhetorically.

<sup>60</sup> Du Plessis, ‘Historical Injustice and International Law: An Exploratory Discussion of Reparation for Slavery’ 25 *Human Rights Quarterly* 3, 624-659, at 624.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Island of Palmas case (or Miangas), United States v Netherlands*, Award, (1928) II RIAA 829, ICGJ 392 (PCA 1928), 4th April 1928, Permanent Court of Arbitration [PCA] (*Hereinafter, Island of Palmas case*).



strata in the development of law are determined by choosing among the competing laws of different times.

This doctrine is a reflection and a natural product of the dynamic nature of international law,<sup>63</sup> which develops over time through state-practice and *opinio juris*, such that, when seen through a historical lens, it appears to form layers of law. Because disputes are not necessarily resolved in tandem with the changes that occur in the law but often persist through these various changes or even emerge at a later time, a conflict of the laws of different epochs is inevitable. Thus, Max Huber explained that in addition to providing that the law contemporaneous with the act should apply, the principle also requires that the “continued manifestation” of a created right “shall follow the conditions required by the evolution of law”<sup>64</sup>—the second “leg” of the principle.

As Elias explains, this principle reflects a Westphalian perspective of international law. This is a law between sovereigns, quite different from law “proper” as the manifestation of sovereignty or authority over subjects. Indeed, he dubs inter-temporality the most important product—in terms of general principles—of the Westphalian conception of law that has prevailed in international law for two centuries.<sup>65</sup> Naturally, a law between sovereigns cannot permit obligations to exist between them without a clear expression of state consent: that would amount to subjecting one sovereign to another. That being the case, it seems only logical that laws must apply contemporaneously in accordance with the notion that the contemporaneous law represents the assumed obligations of the states concerned *vis-à-vis* the events in question. To impose obligations on states that they had not clearly assumed at the relevant time would be to undercut the very basis of international law as understood in purely positivist terms. Consequently, law—which is shorthand for “state consent” in this conception—must be sought in the traditional sources of international law as they stood on the critical date of the issues in dispute.

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<sup>63</sup> Elias TO ‘The Doctrine of International law’ (1980) 74 *The American Journal of International Law* 2, 285-307, at 291.

<sup>64</sup> *Island of Palmas case*.

<sup>65</sup> *Ibid*, at 285.

As already mentioned, this poses problems for reparations causes based on historical injustices such as the *Mau Mau* claims. It seems evident that if it is at all possible to find a legal route around it, such must be done through a principle that can transcend the restrictive system of international law discussed here so far. There can be no better candidate for such a task than concept of *jus cogens*.

b) *Jus cogens*

Unlike the generally resorted to human rights arguments among writers of historical injustices, an argument based on *jus cogens* seems, right from the start, to provide a much better chance at establishing a legal claim where substantive positive rules from the traditional sources are scarce. *Jus cogens* is uniquely defined as both independent from and superior to positive law. Per the VCLT, peremptory norms are norms

“from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”<sup>66</sup>

The Latin phrase itself—*jus cogens*—means “compelling law”<sup>67</sup> and unlike human rights, its basis is not explicitly indicated in any law and indeed is the subject of much debate. While not defined in explicit natural law terminology, *jus cogens* strongly implies naturalist notions such as timelessness and universality. It is also closely linked to the concepts of “community interests” and duties owed *erga omnes*. These concepts together introduce to international law an entity that is somewhat separate from and transcendent over states while including them as its essential components: the “international community as a whole,”<sup>68</sup> or in the precise language of article 53 of the VCLT, “the international community *of states* as a whole”

However, despite this potential, Shelton reports:

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<sup>66</sup> VCLT, article 53.

<sup>67</sup> Black’s Law Dictionary, 7<sup>th</sup> Edition (1999) at 864.

<sup>68</sup> VCLT article 53.

“A *very few* authors have tried to invoke the concept of *jus cogens* to give retroactive effect to certain norms.”<sup>69</sup>

She goes on to explain the reason for this as she sees it: The inclusion of *jus cogens* in the VCLT represented “progressive *development, not codification* of international law”,<sup>70</sup> an issue analyzed in chapter four of this thesis. In fact, it is the aim of this paper to explore, critique and attempt to provide answers to this and other challenges to the application of *jus cogens* to the *Mau Mau* and similar claims of historical injustices.

### c) Structure of the dissertation

The next three chapters shall explore *jus cogens* as a basis for an argument that Britain is internationally responsible for the tortures of *Mau Mau* detainees and similar claims, the scarcity of binding positive rules of the international law contemporaneous with the events in question notwithstanding. It shall be argued that there is no good reason why *jus cogens* norms should not apply in determining past wrongs of a directly humanitarian nature. This is so especially where a direct link can be established between such past harm and present human suffering. Application of humanitarian peremptory norms wherever relevant subject matter is involved is justifiable and does not necessarily lead to legal chaos, as may be feared—where all manner of past acts are endlessly brought before tribunals and the past refuses to rest.

**Chapter two** examines the question of state responsibility and inter-temporal law. A major obstacle lies in the very authoritative ILC Draft Articles on State Responsibility,<sup>71</sup> whose position seems to be that *jus cogens* norms cannot impact cases that are rooted in

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<sup>69</sup> Shelton D (2008) *Reparations for Indigenous Peoples: The Present Value of Past Wrongs*. In: Lenzerini F *Reparations for Indigenous Peoples: International and Comparative Perspectives*, at 162.

<sup>70</sup> *Ibid.*

<sup>71</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

events that occurred before their coming into force. A critique of this position is the subject of chapter two.

**Chapter three** argues on the basis of a normative conflict between *jus cogens* and inter-temporal law, particularly through the principles of the ILC conclusions on fragmentation of international law<sup>72</sup> and those employed by the ICJ in the *Jurisdictional Immunities case*.<sup>73</sup> Because of the unique problem of time, a conflict seems readily apparent yet not easily justified. Demonstrating the said conflict is the task of chapter three.

**Chapter four** looks at the temporal scope of *jus cogens* in itself—including the scope of individual peremptory norms and their basis in morality. The impact and implications of the VCLT in their regard, including the complications of article 53 are discussed.

**Chapter five** lays down arguments against rigid application of inter-temporality based on the theories of evolutionary interpretation of treaties and the interests of the international community as a whole, while **Chapter six** provides a conclusion.

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<sup>72</sup> Report of the International Law Commission on the work of its Fifty-Eighth Session (1 May - 9 June and 3 July - 11 August 2006) Official Records of the General Assembly, Sixty-First Session, Supplement No. 10 (Hereafter, ILC study on fragmentation).

<sup>73</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J. (February 3).

## CHAPTER TWO: A CRITIQUE OF THE APPLICATION OF INTER-TEMPORALITY IN THE LAW OF STATE RESPONSIBILITY—A *JUS COGENS* EXCEPTION?

Article 31 of the Draft Articles on State Responsibility provides that full reparation is due for each “internationally wrongful act”.<sup>74</sup> The duty to pay reparation then arises independently as a substantive duty of international law.<sup>75</sup> For the cause of reparations for historical injustices, the challenge then is to find the internationally wrongful act for which reparation is due. Such an act must be attributable to a state<sup>76</sup> and constitute a “breach of an international obligation of the state”.<sup>77</sup>

There is no doubt that the acts of torture that British colonial officers inflicted on *Mau Mau* claimants constitute serious breaches of *modern* International Law. Such has already been admitted as far as the facts go, as indicated in chapter one. The question is: is modern international law relevant to the determination of this question in historical cases? Article 13 of the Draft Articles seems at first glance to answer in the negative. It provides that

“an act of state does not constitute a breach of an international obligation unless the state is bound by the obligation in question at the time the act occurs.”

This is the inter-temporal principle discussed in chapter one, which requires juridical facts to be examined in accordance with contemporaneous law. Indeed, the difficulty represented by inter-temporal law is nowhere better demonstrated than in the ILC’s treatment of the principle in the process of codifying the law on state responsibility. The ILC admits virtually no exceptions to the principle except voluntary assumption of responsibility—which of course, is no exception at all. To the ILC, not even *jus cogens*,

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<sup>74</sup> ILC Draft Articles (state responsibility), article 31.

<sup>75</sup> *Ibid*, article 31.

<sup>76</sup> *Ibid*, article 2(a).

<sup>77</sup> *Ibid*, article 2(b).

being of a higher status than inter-temporal law in international law, provides an exception to that rule. This chapter interrogates this position.

## **I. Inter-temporality and *jus cogens* in the law of state responsibility**

The ILC's position on this question, described above, appears by way of its commentary on Article 13 of the final Draft Articles.<sup>78</sup> The position is simply that the law of inter-temporality applies in the same way in the case of emergent peremptory norms as it does in the case of emergent non-peremptory norms.<sup>79</sup> But it is argued here that such an absolutist position is not justified or adequately explained, specifically as it regards the effect of peremptory norms on inter-temporality.

The problem with the ILC approach, as shall be argued throughout this chapter, is that it ignores the conceptual place of peremptory norms in international law and does not appear to provide an adequate explanation why exactly inter-temporal law should be unaffected by *jus cogens*. Peremptory norms by definition must be presumed to be pre-eminent over any other non-peremptory rule or principle of international law, including inter-temporal law. It is therefore not enough to put the principle aside on account of scarcity of practice or jurisprudence, or even on account of practice and jurisprudence in which the principle was seemingly put aside. As Bjorge puts it,

“If *jus cogens* constitutes the bedrock of the international legal order...then surely this constitutional backdrop is pertinent to the understanding of inter-temporal law”<sup>80</sup>

The ILC also concluded in its study on fragmentation of international law that,

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<sup>78</sup> 'Report of the International Law Commission on the Work of Its Fifty-Third Session (23 April to 1 June and 2 July to 10 August 2001)' [2001] II (2) *Yearbook of the International Law Commission*, at 57 – 59.

<sup>79</sup> *Ibid*, para (6).

<sup>80</sup> Bjorge E (2014) *The Evolutionary Interpretation of Treaties*; Oxford University Press, 165, 166.

“International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles.”<sup>81</sup>

*Jus cogens* being superordinate in this system, its relationship to and effects on other norms must not be dismissed lightly. In short, the rationale for the ILC approach regarding peremptory norms and inter-temporal law in the Draft Articles on State Responsibility is missing.

#### a) The Vienna Convention

The ILC position is principally based on the VCLT—particularly Article 71 2(b), which provides that an emergent peremptory norm “does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm.”

In the commentary on the Draft Articles on the Law of Treaties<sup>82</sup> before they became the VCLT, the Commission explained that it was felt inappropriate to treat pre-existing but conflicting (with peremptory norms) treaties as void *ab initio*.<sup>83</sup> Instead, treaties that pre-exist an emergent peremptory norm are considered invalid only from the moment of the emergence of the new peremptory norm—hence “terminated”<sup>84</sup>—in contrast to treaties contracted while a conflicting peremptory norm already exists, which are completely null and void.<sup>85</sup> From this, the rule on state responsibility was extrapolated, namely, that the

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<sup>81</sup> Hereafter, ILC study on fragmentation, conclusion 1.

<sup>82</sup> 'Report of the International Law Commission on the Work of Its Eighteenth Session (23 April - 1 June and 2 July - 10 August 1966)' [1966] II (2) *Yearbook of the International Law Commission* 1.

<sup>83</sup> *Ibid.*, at 248—249, para 6.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

legal status of facts occurring before the emergence of a conflicting peremptory norm would not be in any way affected.

However, Tavernier notes that the conclusion is not explicit in the VCLT.<sup>86</sup> After all, only those pre-existing rights that conform to *jus cogens* may persist, per article 71 quoted above. In other words, the conclusion reached by the ILC interpretation is not strictly necessary. Moreover, the VCLT's authority itself—on the question of *jus cogens*—is a matter of debate.<sup>87</sup>

### **b) State-Practice and Jurisprudence**

In addition to the above, the ILC relied on slavery cases as evidence of the non-retroactivity of *jus cogens*. For example, the decisions of Joshua Bates, umpire of the United States-Great Britain Mixed Commission, were specifically cited.<sup>88</sup> These cases concerned the confiscation of American slave-ships and the freeing of captured slaves found therein by British agents. The events in question had taken place at varied times, during which the law on slavery had changed. While it was wrongful for one state to capture and search the ship of another state during peace time, the slave-trade had long been banned by international law by the time Bates was hearing the cases, and such actions taken against the ships at that time would not have been considered illegal. The umpire applied the inter-temporal principle and declared the capture of ships and freeing of slaves to have been illegal where they were done before the ban on the slave-trade had been made an explicit part of international law.

Bjorge explains that the ban on the trade could possibly have already acquired peremptory status by the time of the arbitration by Bates—though this was not stated<sup>89</sup>—so that, based on this practice, the ILC might be entitled to consider as it does, that not

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<sup>86</sup> Crawford J, (2013) *State Responsibility: The General Part*, Cambridge University Press, quoting Tavernier at 250 (footnote 58).

<sup>87</sup> Discussed in chapter four.

<sup>88</sup> Commentary on Draft Articles (State Responsibility), at 57, para 2.

<sup>89</sup> Bjorge at 166.



even *jus cogens* provides an exception to the general principle of inter-temporal law. However, as noted by Bjorge himself, there exists contrary state practice, jurisprudence and doctrinal statements regarding the very same subject-matter.<sup>90</sup>

One such practice is found in the terms of the German-French *Compromis* of 1880 setting up a claims commission for citizens of the two countries. It excluded from among claims which could be brought before the Commission, any “claim, or item of loss or injury or damages based on the loss or emancipation of slaves.”<sup>91</sup> Lammasch in 1913 relied on that practice to reach a conclusion that is diametrically opposed to that reached by the ILC in the Draft Articles. In his view, where an international tribunal finds itself having to render a decision that at the time of the judgment seems positively opposed to the prevailing public morals, “for example, to recognize the slave-trade as an acceptable commercial practice”,<sup>92</sup> the tribunal is then authorized to abandon the principle leading to the unacceptable conclusion and to instead apply higher legal principles and equity.<sup>93</sup>

In more modern times, the inter-American Court in the *Aloeboetoe case*<sup>94</sup> considered a 1762 treaty between the *Saramaka* tribe and the Republic of Suriname that included among its terms, the capture and sale of slaves. The Court regarded the treaty as being wholly incapable of invocation before a human rights tribunal. This was so even though the actual reason the treaty was invoked had nothing at all to do with the slave-trade or slavery itself. In point of fact, the treaty had been invoked for the purposes of establishing family structures in the *Saramaka* tribe, in order to determine compensation for relatives. But the Court seems to have regarded that treaty as a whole as being completely unqualified to be treated as law in any way. It could only have done so by judging the contents of the treaty against the fundamental public morals of modern international society. Indeed, such reasoning is in accord with the nature of *jus cogens* as understood in

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<sup>90</sup> *Ibid* at 165—167.

<sup>91</sup> *Ibid*.

<sup>92</sup> *Ibid*, citing Lammasch at 166.

<sup>93</sup> *Ibid*.

<sup>94</sup> *Case of Aloeboetoe et al v Suriname, Aloeboetoe and Ors v Suriname*, Reparations and costs, IACHR Series C no 15, [1993] IACHR 2, IHRL 1396 (IACHR 1993), 10th September 1993, Inter-American Court of Human Rights [IACtHR].

modern international law: “Norms commanding peremptory authority, superseding conflicting treaties and custom.”<sup>95</sup> It is therefore unclear why it should not be allowed any effect on the formulation of the rules of state responsibility with regards to inter-temporality.

In fact, the ILC had initially expressed a view that was somewhat similar to that of Lammasch, above. Concerning the Bates decisions on the slave-trade, the ILC had initially advanced an argument saying that, had the matter been decided at a later period—when the ban on slavery was not only illegal but clearly considered peremptory, and, in addition, imposing compulsory obligations on states to actively combat the trade—it would not have been open to the umpire to determine as he did, that such action as freeing slaves was illegal in accordance with the contemporaneous law.<sup>96</sup> Such a finding would be “inconceivable”<sup>97</sup> especially when the change in law—from the prohibition of an act to its compulsory requirement by a *jus cogens* norm—had been one that was primarily moral or humanitarian in its purpose.<sup>98</sup>

Another example given was a hypothetical case where one country (state A) bound to supply arms to another by treaty, refuses to do so knowing that such arms are to be used by state B to violate an oppressed people’s right of self-determination, at a time when that norm is still in the process of formation. Should the dispute between the two states be decided after the peremptory nature of the norm is clear, the commission did not consider it possible for state A to bear responsibility for its breach of the arms-treaty.<sup>99</sup> In subsequent readings of the articles, however, the ILC deleted article 18(2) which had articulated this as a principle.<sup>100</sup>

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<sup>95</sup> Criddle EJ & Fox-Decent E ‘A Fiduciary Theory of Jus Cogens,’ (2009) 34 *Yale JIL*, 331 at 332; (Hereinafter, Criddle & Fox-Decent).

<sup>96</sup> Report of the International Law Commission on the Work of its Fifty-First Session (3 May - 23 July 1999) Official Records of the General Assembly, Fifty-Fourth Session, Supplement No.10, at 101, paras 15—16.

<sup>97</sup> *Ibid*, para 16.

<sup>98</sup> *Ibid*, para 15.

<sup>99</sup> *Ibid*, at 101—102, para 17.

<sup>100</sup> ILC Report (1999) at 57, para 129.

The Special Rapporteur explained that the former reasoning had contemplated a scenario in which, on one day, an act is illegal, and then almost immediately after, it becomes compulsory through the operation of a peremptory norm.<sup>101</sup> Such an occurrence is unknown in the history of international practice, hence the reluctance to include the reasoning based on it in the articles. However, it is again not quite certain why such reasoning need only apply in such an improbable scenario: where a drastic change in the law occurs in a matter of days. This is even more so when one considers that in the former discussion, it had not been the length of time in which the change occurred that had been the focus of the exposition, but rather the *nature* of the new law as (a) compulsory (b) moral-humanitarian and (c) peremptory.

In any event, the principle is considered to have been reinserted into the articles by way of Article 26 which says,

“Nothing in this chapter shall preclude the wrongfulness of any act of a state which is not in conformity with an obligation arising under a peremptory norm.”

Hence—Crawford explains—“the emergence of a new peremptory norm is considered to be a circumstance precluding wrongfulness that has retrospective application.”<sup>102</sup> This is essentially the principle that had been article 18(2) in the previous articles. The effect of this is that a breach will not be considered to have occurred where a party has acted contrary to an established norm, in contradiction of which a new peremptory norm later emerged requiring the very same act.<sup>103</sup>

Therefore, a state can be precluded from relying on inter-temporal law to claim reparation from another state on the basis of an act constituting a past breach of a norm where the act is now required by a peremptory norm. However, the state cannot by the same token be precluded from relying, in its own defense, on a past permissive rule or the past

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<sup>101</sup> Crawford at 250.

<sup>102</sup> *Ibid* at 251.

<sup>103</sup> *Ibid*.

absence of a prohibitive rule. Stated positively, *jus cogens* prevents past “internationally wrongful acts” from being treated as such, but cannot be used to classify past permissible acts as “internationally wrongful acts.” The one clearly involves retroactive application of the emergent *jus cogens* norm, and the other, a refusal to do so. Yet the logic behind the distinction has not been fully articulated.

Concerning the ECtHR’s refusal to adjudicate on disputes that arose before the state-parties’ entrance into the Convention regime, the commentary explains,

“The same principle has consistently been applied by the European Commission and the European Court of Human Rights to deny claims relating to periods during which the European Convention on Human Rights was not in force for the State concerned.”<sup>104</sup>

While this position is correct, a distinction must be made between conventions as treaties and their substantive content, which may supersede the treaty. Much of what the ECHR provides is not only present in numerous other human rights instruments, but also in international customary law. Some of the conventional provisions are even of *jus cogens* status, such as the prohibition of torture in Article 3. It is not the case that obligations indicated in the ECHR come into force for state-parties only after they become signatories to it. Rather, it is the Convention itself, along with its institutions, that comes into force for the party on that date.

In fact, equally valid is an interpretation of the European jurisprudence as dealing with jurisdiction, so that the Court is seen as prudentially limiting its own sphere of competence to the Convention itself. As a treaty and being consent-based, the convention applies only to certain states and from certain times. Indeed, the Court sees its own role as “exclusively limited to direct supervisory functions”<sup>105</sup> over the ECHR and thus must be dependent on it for its own jurisdiction. The ECtHR refuses to judge the pre-

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<sup>104</sup> Commentary on Draft Articles (State Responsibility), at 58, para 2.

<sup>105</sup> *Loizidou vs. Turkey* (Preliminary Objections), Judgment of 23 March 1995, Series A no. 310 p. 25.

Convention violations simply for lack of jurisdiction and not because the parties themselves are not otherwise bound by those substantive obligations. Moreover, the ICJ explained,

“...there is a fundamental distinction between the acceptance by a state of the Court’s jurisdiction and the compatibility of particular acts with international law. The former requires consent. The latter question can only be reached when the Court deals with the merits, after having established its jurisdiction.”<sup>106</sup>

Thus, Orakhelashvili’s conclusion that the refusal by international tribunals to extend jurisdiction beyond the moment of consent is a principle that flows from inter-temporality *per se*<sup>107</sup> is not necessary. For him, the consensual nature of judicial jurisdiction flows from the fact that international law “does not bind states without their consent.”<sup>108</sup> That is, the court’s jurisdiction is limited by the fact that substantive obligations are not retroactive. To the contrary, as the ICJ’s explanation makes clear, this refusal flows from the fact that international tribunals have no automatic compulsory jurisdiction of their own, and not from the fact that substantive obligations do not exist. No link to inter-temporality is necessary, and thus, no strict principles need be drawn from these decisions as far as the scope of *jus cogens* or even human rights are concerned.

### **c) A Human rights exception?**

Moreover, scholars have expressed the view that there exists a human rights exception to the inter-temporal principle.<sup>109</sup> Leaving aside the debate on which human rights have attained *jus cogens* status, the suggested exception refers to human rights obligations in general. The Special Rapporteur commented on the authorities cited for this exception:

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<sup>106</sup> *Fisheries Jurisdiction (Spain v. Canada)*, 1998 I.C.J. 432 (Dec. 4) at para 55.

<sup>107</sup> Orakhelashvili A (2006) *Peremptory Norms in International Law*, Oxford University Press, New York, 491—492.

<sup>108</sup> *Ibid* at 491.

<sup>109</sup> Higgins R ‘Time and the Law: International Perspectives on an Old Problem’ 46 *International and Comparative Law Quarterly*, 501-520.

mainly Judge Tanaka's oft-cited dissenting opinion in the *South West Africa case* and the *Namibia case*<sup>110</sup> which Judge Higgins relied upon in explaining the exception.<sup>111</sup>

In 1966,<sup>112</sup> the ICJ interpreted the duty of mandatory states—the “sacred trust of civilization”<sup>113</sup>—according to the law of 1920 when the mandate system was created by the League of Nations. On the other hand, Judge Tanaka and the minority view held that the new generation of customary law on human rights, post-World-War-II, were indispensable in interpreting the terms of the mandate. Later, in 1971,<sup>114</sup> the ICJ followed this latter view. The ECtHR has also treated the European Convention as a “living instrument”<sup>115</sup> and applied later standards of human rights in international customary law as opposed to those of the time when the treaty was concluded.

The Special Rapporteur explains that, in his view, the above does not constitute an exception to inter-temporality at all.<sup>116</sup> This is because there is no inherent incompatibility between inter-temporal law and the evolutionary theory of interpretation of treaties—Max Huber's second “leg” in his definition of the principle, now embodied in article 31 of the VCLT.<sup>117</sup>

However, Judge Tanaka's view had involved more than the evolutionary theory of interpretation. For him, the logic of inter-temporal law lies in the notion of “acquired rights”, such that new law cannot be used to deprive legal subjects of rights already held on the basis of an old law. The Judge evidently did not regard the mere absence of clearly stated positive rules prohibiting inhuman conduct as conferring a right on South Africa to engage in said conduct. There was therefore no “right” acquired that could be the subject

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<sup>110</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21).

<sup>111</sup> *South-West Africa Cases advisor* (Judge Tanaka's Dissenting Opinion).

<sup>112</sup> *Ibid* at 294.

<sup>113</sup> League of Nations, *Covenant of the League of Nations*, 28 April 1919, article 22.

<sup>114</sup> *Namibia case*.

<sup>115</sup> *Tyrer v United Kingdom* (1978) ECtHR, 5856/72.

<sup>116</sup> Crawford at 247—250.

<sup>117</sup> VCLT, article 31 (3) (c) provides that interpretation of treaties should take into account “any relevant rules of international law applicable in the relations between the parties.”

of protection by the inter-temporal principle. This understanding of inter-temporality is echoed by Judge Al-Khasawneh in the *Bakassi case*.<sup>118</sup>

“Furthermore, it is perhaps in the realm of criminal law that the rule of inter-temporal law comes to the forefront and lends itself to delineation. This is so because the temporal aspect in the maxim *nullum crimen nulla poena sine lege* requires a precise definition, yet it was precisely in this same realm that the rule has been significantly abandoned. Thus, the operation of the rule would have acted to shield the perpetrators of grave crimes in World War II from criminalization because many of these crimes were not part of positive law, but in the event, as is well known, *that protection afforded by adherence to inter-temporal law was not accepted*. If such was the case where the law was more precise, the concept itself more readily delineated and the consequences, criminalization, grave, *I see no reason why a behaviour that is incompatible with modern rules of international law and morally unacceptable by modern values underlying those rules should be shielded by reference to inter-temporal law*, all the more so when the reprobation of later times manifests itself not in criminalization but merely in invalidation.”<sup>119</sup>

These judges view inter-temporality primarily as something that *shields*, and that should therefore not be allowed to shield indiscriminately. However, Judge Tanaka’s statement that there can be no recognized “right to inhumanity”<sup>120</sup> is somewhat confusing. While it can be interpreted as a statement of his view on general law, the fact that he links it to the mandate system makes it impossible to presume so automatically. This is because the premise of his denial of the “right to be inhumane” appears to be the fact that the mandate does not exist for the mandatory’s benefit, in which case there can be no rights but only obligations.

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<sup>118</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.)*, 2002 I.C.J. 303 (Order of Oct. 10).

<sup>119</sup> *Ibid*, at 204.

<sup>120</sup> *Ibid*.

Put differently, would the expressed view differ if the treaty in question was one that did not have as its purpose ethical aims, but that nonetheless affected human rights substantially or detrimentally? Could a treaty focused on state “rights” and not obligations confer the “right to inhumanity” on state-parties that Judge Tanaka denies to South Africa and other mandatories? Or is the source of obligation—be it treaty, custom or general principle, new or old norms—unimportant? Restated, is the “right to inhumanity” denied merely because of the nature of the treaty involved—one of trust or obligation—or is it denied because there is in fact, no such recognizable right to act inhumanely in international law?

This refusal to recognize a “right to be inhumane” is not much different from the inter-American Court’s treatment of the “Surinamese-*Suramaka* treaty” cited above, which it refused to regard as a legal instrument, thus invalidating it retrospectively. In the views of the above-quoted ICJ judges, states cannot be viewed as being completely unrestricted in matters of human rights merely because of a lack of clarity in the rules. In Judge Tanaka’s words,

“What ought to have been clear 40 years ago has been revealed by the creation of a new customary law which plays the role of authentic interpretation the effect of which is retroactive.”<sup>121</sup>

So, while the minority view unmistakably deals with the evolutionary theory of interpretation, it is impossible to say that it is not speaking also of retroactivity when it says that states had no right to act a certain way before positive international law clearly prohibited such behavior. Moreover, if the new customary rule on human rights has retrospective effect on treaties, why should it lack similar effect on the general international law?

***d) Nullum crimen nulla poena sine lege***

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<sup>121</sup> *Ibid* at 294.



Connected to the preceding discussion is the theoretical exception to inter-temporality, also rejected by the ILC. This is the principle of legality, referred to above in Judge Al-Khasawneh's quote. More precisely, the exception is based on the rare incidents in state practice and the jurisprudence of international and municipal courts where the principle of legality has not been applied. While it is generally established in modern international law that law should not be applied retroactively to criminalize certain actions, this rule has not been absolute.

At Nuremberg, for example, the concept of “crimes against humanity” was written into the charter of the tribunal<sup>122</sup> to fill a gap that then existed in international law as far as some of the Nazi atrocities were concerned.<sup>123</sup> Specifically, these were crimes committed within Germany itself against Germany's own people. Before then, it had generally been understood that international law did not concern itself with how states treated their own subjects within their own borders. However, this did not deter the tribunal from subjecting the accused persons to prosecution for some of those—then only recently “positivised”—international crimes.

Israeli courts followed suit in the *Eichmann trial*<sup>124</sup> and in a subsequent appeal therefrom.<sup>125</sup> Eichmann was a former Nazi official who had been illegally kidnapped and transported to Israel from Argentina for trial.<sup>126</sup> The justification given was that the

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<sup>122</sup> United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, 8 August 1945; article 6 (c) provides jurisdiction for “Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against *any civilian* population, *before or during the war*, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

<sup>123</sup> Schabas W (2012) *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals*, Oxford University Press, 50—51.

<sup>124</sup> *Attorney-General of the Government of Israel v Adolf Eichmann*, District Court of Jerusalem, Israel (December 12, 1961) International Law Reports, Vol. 36. (1968) at 18—276.

<sup>125</sup> *Eichmann v Attorney General*, Supreme Court of Israel (May 29, 1962) International Law Reports, Vol. 36. (1968) at 18—276.

<sup>126</sup> Inazumi M (2005) *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, 63.

illegal character of the offence of genocide should have been obvious to everyone due to its grave moral reprehensibility.<sup>127</sup>

The court seems to say that the law at the relevant time included the prohibition of genocide, the lack of a definite rule to that effect notwithstanding. Alternatively, it suggests that acts contrary to universal morality do not require legislation. This is justified by the fact that justice, which is the principle purpose of the principle of legality in this Court's view, is not violated in the case of crimes so "odious" as genocide and "crimes against humanity" and in such "scope and dimensions" as were carried out by the Nazis.<sup>128</sup> Hence, *crimen nulla poena sine lege* in this case "loses its moral value and is devoid of any ethical foundation."<sup>129</sup> It can therefore be said that in the eyes of the Israeli Court, the question was not just a matter of retroactive application of the law but also an argument from some form of non-positivist conception of international law, as argued later in chapter four.

Similarly, the cases of *CR vs United Kingdom* and *SW vs United Kingdom*<sup>130</sup> each consisted of the convictions of a man for the rape of his wife (in *CR*, it was attempted rape). The act had been committed when the common law of England still recognized, or appeared to recognize, a marital immunity for husbands with regard to forceful intercourse with their own wives. More precisely, rape consisted of "unlawful" intercourse and the English common law did not regard forceful intercourse with one's own wife as "unlawful". Upon application to the ECtHR on the basis of article 7<sup>131</sup> of the

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<sup>127</sup> *Eichmann case* (Appeal) at point no. 13.

<sup>128</sup> This is essentially the argument in chapter four, wherein the moral nature of *jus cogens* is seen as essential in determining its temporal scope.

<sup>129</sup> *Ibid.*

<sup>130</sup> *S.W. v United Kingdom: C.R. v United Kingdom* (1995) 21 EHRR 363.

<sup>131</sup> ECHR, article 7 provides, "1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations."

ECHR (which prohibits retroactive application of criminal law), the UK judgments were held to be in accordance with the convention.

The European Court relied on the reasoning of the UK courts regarding the common law, which was to the effect that by the time the offence had occurred, the common law could no longer be considered as sanctioning the rape by husbands of their wives for any reason whatsoever. This was due to the progressive changes in social views on the matter that had taken place in British society and the progressive evolution of the principle by the UK courts over a number of cases spanning a number of years—though they had not yet led to a clear rejection of the immunity of husbands in the law. Essentially, the reasoning applied in dismissing the application was that the defendants should have known that they could no longer rely on the state of the contemporaneous law regarding the matter, as it had been clear at the time the acts occurred that the law was changing and that such conduct was surely going to be prohibited. In the face of its imminent over-turning, the applicants were not entitled to any expectation that the law would grant them immunity. The European Court's view was also bolstered by the fact that the conduct of which the accused had been convicted was itself in contravention of values and rights protected by the ECHR.

Again, as in the *Eichmann case* in Israel, it is not completely clear whether the court was applying the law retroactively, or simply claiming that the law in question already existed at the relevant time despite the absence of clear notice to the defendant in the form of a plainly defined positive rule. It is also possible that the Court's view is based on the same premise as the Israeli Court's judgment, regarding the lack of injustice in applying the law retroactively in that particular case.

In the end, it appears that the entire reasoning based on the principle of legality has been rejected by the ILC. This conclusion may be influenced by the fact that the principle of legality has become a fundamental rule in criminal and human rights law, evidenced in the ECHR itself, though this does not necessarily mean that the former incidents were legally erroneous.

It may also be contended that the principle, being a criminal law principle, cannot, together with its possible exceptions, be deemed applicable to the law of state responsibility. Yet this is not sustainable either. As Judge Al-Khasawneh said in reference to the abandonment of inter-temporality at *Nuremberg*, if a principle is applicable in criminal law, its attendant grave consequences notwithstanding, then all the more so is it applicable to other legal situations, even those implicating states as subjects. Moreover, to regard international laws as possibly theoretically retrospective for individuals but not for states would amount to placing a greater burden of responsibility for their observance on individuals rather than on states, which are in fact the direct subjects of international law.

This leaves state consent as the only acceptable way of justifying the criminal law exceptions without implicating automatic application in state responsibility. State consent, after all, needs no justification, for states are free to contract on all matters excepting those violating *jus cogens*. In fact, the ILC recognizes this in the commentary by providing as an exception to article 13, that states can voluntarily assume responsibility for past wrongs. Thus, such exceptions to the principle of legality as discussed above might be explained by describing them as simple expressions of state acts expanding the temporal scope of the new laws into the past.<sup>132</sup>

Nonetheless, while it is easy to justify the expansion of the scope of a rule of *jus cogens* thus, it is not so easy to justify its contraction based only on state consent. The latter would be the case if we assumed that the rule of *jus cogens* enjoys a wide temporal scope in itself, an argument that is explored in chapter 4. As is discussed later (also in chapter 4), *jus cogens* does not depend merely on positive law but on the substantive character of the actual norm itself and the function it serves vis-à-vis the international community interest. This is indicated by the ILC in its commentary on the Draft Articles that became

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<sup>132</sup> The same position is declared in resolution no. 2 of 'Intertemporal Problem in Public International Law', 56 *Ann. de l'Institut de Droit Int'l* 537 (1975).

the VCLT,<sup>133</sup> and in the debates that went into the preparatory work for those articles and finally, the treaty and Draft Articles on State Responsibility. It is therefore difficult to rationalize the limitation of the scope of *jus cogens* merely by appealing to some expression of state consent, without also grounding it on some substantive basis in an uncompromising common legal interest of the international community.

## II. Conclusion

As hopefully became apparent in the preceding discussion, a distinction is made between situations involving a “simple act”<sup>134</sup> from those involving some kind of legal rule. The former refers to a situation where the contemporaneous law does not appear to have dealt directly or explicitly in any way with the subject-matter. As a result, these acts are generally presumed to have been legal at the time they occurred simply because they were not clearly prohibited. The ICJ’s ruling in the *Lotus case*<sup>135</sup> discussed in the next chapter establishes this principle, which would appear to be the assumption of the ILC in the preceding discussion.

The other case, as indicated, involves a situation where a positive rule from the period the act occurred has since been reversed through a peremptory norm. In particular, it concerns acts that previously have been prohibited by some rule of international law, only to be made compulsory later on by operation of a norm of *jus cogens*. The ILC gives some retroactive application to this type of act through draft article 26 as a circumstance precluding wrongfulness.

The alternative situation is dealt with differently: an act may have been a simple act or it may have been a positive<sup>136</sup> legal obligation—authorized or even required by way of treaty, custom or general principle—but later prohibited by a peremptory norm. The

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<sup>133</sup> Commentary on Draft Articles (Law of Treaties), at 247, para 1.

<sup>134</sup> Crawford uses the term at 251.

<sup>135</sup> *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

<sup>136</sup> “Positive” is used here as referring to the performance of some act, as opposed to a negative obligation (requiring the subject to refrain from an act). It has nothing to do with the theory of positivism contrasted with natural law theory.

sense of a conflict between norms exists more clearly in the latter case, the significance of which is discussed in the next chapter. In either of these two cases, the ILC does not permit the peremptory norm any retroactive effects, unlike the case where a prohibited act becomes compulsory. There is no rationale for the distinction, however.

Given the place of *jus cogens* vis-à-vis non-peremptory norms, it would seem that the proper and logical approach should be to presume the application of *jus cogens* (where relevant subject matter is concerned, of course) unless its non-application is justified, and such justification is clearly reasoned. Instead, it would appear that the opposite approach has been taken: It is presumed that inter-temporal law must always apply, and failing to find a rule of custom or treaty authorizing a *jus cogens* exception—in the case of simple acts—the possibility is simply dismissed. The difference is not an academic one because it leads to different conclusions. In summary, and in light of the above discussion, it is not justified to take a categorical and uncompromising stance based on the inter-temporal principle where *jus cogens* is concerned without an adequate explanation for this approach being attempted.

### CHAPTER THREE: DOES *JUS COGENS* TRUMP INTER-TEMPORAL LAW? ARGUMENTS FROM PRINCIPLES OF NORMATIVE CONFLICT

In the ILC study on the fragmentation of international law, “relationships of conflict” in the international legal system are said to exist where “two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them.”<sup>137</sup> The international legal practitioner is then directed to the basic rules of the VCLT for resolution of the varied forms of normative conflicts in international law, including the several principles set out in the 42 conclusions of the referenced study. Of importance is conclusion 42, which provides,

“Conflicts between rules of international law should be resolved in accordance with the principle of harmonization, as laid out in conclusion (4).<sup>138</sup> In the case of conflict between one of the hierarchically superior norms referred to in this section and another norm of international law, the latter should, to the extent possible, be interpreted in a manner consistent with the former. In case this is not possible, the superior norm will prevail.”

From the above, normative conflict is determined by establishing: a) the presence of two norms of international law; b) the requirement that both norms be valid and applicable in the relevant subject matter; and c) the requirement that the two norms point to incompatible decisions, forcing a choice to be made between them.

On the other hand, the ICJ has recently dealt with the subject of normative conflict involving *jus cogens* in the *Jurisdictional Immunities case*. The international court was tasked with answering the question of the meaning and effect of a conflict between an ordinary rule/principle of international law and *jus cogens*—in particular, a conflict

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<sup>137</sup> ILC study on fragmentation, conclusion 2.

<sup>138</sup> Conclusion 4 titled “The Principle of Harmonization”, says, “When several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.”

alleged to exist between state immunity and the rules of International Humanitarian Law flouted by Germany in Italy in the course of the conduct of hostilities in World War II.

As Hernández says, this case is significant because it is the only case in which the International Court has dealt directly and decisively with the question of “the effects of characterizing a legal rule as *jus cogens*.”<sup>139</sup> According to him, there were a number of ways that the court could have gone about resolving the questions before it without laying down principles that would then have great effect beyond this particular case<sup>140</sup> (and indeed, beyond the specific question of the relationship between state immunity and *jus cogens*). Instead, the ICJ found a resolution that Hernández considers “unusually decisive, resolving not only the case before it but taking a position of principle.”<sup>141</sup> This principle was based on the Court’s “considered view” on the “form of rules of *jus cogens*” and “on the nature of the norm within the international legal order, and how it ought to be interpreted and applied.”<sup>142</sup>

Indeed, it can be objected that the court in *Jurisdictional Immunities* was dealing with a specific contradiction—between *jus cogens* and state immunity—and it would therefore be inappropriate to apply the principles articulated therein to a principle such as inter-temporal law that was not then in consideration, at least as far as this question of a conflict with *jus cogens* is concerned.<sup>143</sup>

However, this objection does not stand. This is evident in the presumptions the court makes as it proceeds to test state immunity against its understanding of what a conflict with *jus cogens* entails. There is nothing in these presumptions of the court that is

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<sup>139</sup> Hernández GI ‘A Reluctant Guardian: The International Court of Justice and the Concept of ‘International Community’ (2013) *British Yearbook of International Law* . Hereinafter, this article is referred to as: Hernández (Reluctant guardian).

<sup>140</sup> *Ibid* at 43—45.

<sup>141</sup> *Ibid* at 43.

<sup>142</sup> *Ibid*.

<sup>143</sup> The court did discuss inter-temporal law (page 124, para 58), but it did so with regard to state immunity (an ordinary principle) and not the substantive IHL rules prohibiting German conduct. Hence, no conclusion can be drawn from that paragraph regarding the question of a conflict between inter-temporal law and *jus cogens*.



inherently specific to state immunity *per se*. Rather, the court is testing state immunity against its assumptions about what a conflict with a peremptory norm involves—assumptions that largely correspond with the general principles in the conclusions on the study on fragmentation of international law, above-cited.

This chapter focusses on principles used to establish normative conflict in the *Jurisdictional Immunities* case and two of the principles set forth in conclusion 2 of the ILC study on fragmentation, referenced earlier. The question of validity and applicability is slated for discussion in chapter four where the temporal sphere of *jus cogens* in international law is considered more directly.

### **I. The *Jurisdictional Immunities* case: Meaning and effect of normative conflict with a peremptory norm**

In this case, the theory that there exists a hierarchy of norms in International law atop of which sits the *jus cogens* was accepted by the ICJ in principle, as in other cases (for example, the *Kosovo*<sup>144</sup> and *Nuclear Weapons*<sup>145</sup> advisory opinions). However, the hierarchy that the ICJ has in mind is much less ambitious than had been the view of many scholars.<sup>146</sup> The supremacy of *jus cogens* has been construed in the narrowest sense

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<sup>144</sup> *Accordance with Int'l Law of the Unilateral Declaration of Independence by the Provisional Inst. of Self-Gov't of Kosovo*, Advisory Opinion, 2010 I.C.J. (July 22); The court declared unlawful a declaration of independence made in connection with violations of the rules of *jus ad bellum*.

<sup>145</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. (July 8)—The court described norms of IHL (*jus in bello*), as “intransgressible principles of international customary law” binding all, whether they acceded to the 6 conventions or not. [These are the four 1949 Geneva Conventions and two Additional Protocols (International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3; International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609)]. The court also stated that “the intrinsically humanitarian character” of IHL “permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.”

<sup>146</sup> Lucas B ‘International Law and The International Court of Justice’s Decision in *Jurisdictional Immunities* of the State’ 13 *Melbourne Journal of International Law* 2 (2012), 774, at 777—781.

possible: *jus cogens* indeed trumps all law that comes into conflict with it, but conflict means no more than to be in direct contradiction of the substantive content of a specific peremptory norm.

Briefly, the facts of the case were as follows: Having violated the imperatives of IHL rules in World War II, Germany had sought to rely on state immunity in a municipal civil suit based on these violations before the courts of Italy.<sup>147</sup> In its turn, Italy—after denying Germany the state immunity it had sought in *Ferrini* and *Distomo* (based on a decision of Greek courts)<sup>148</sup>—sought to rely on *jus cogens* and other arguments before the ICJ after Germany instituted a suit based on this denial of immunity.

The Court's solution, in summary, was that a conflict cannot exist between state immunity and *jus cogens* because the rules of state immunity “do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was *lawful or unlawful*.”<sup>149</sup> The view of the international system as some form of vertical constitutional order in which *jus cogens* sits at the very top compelling all law to be consistent with its objects and purposes both directly and indirectly was thus rejected. In this, the court followed a long line of jurisprudence—*Al-Adssani*<sup>150</sup> and *Kalogeropoulou*<sup>151</sup> at the ECtHR and a string of municipal court decisions<sup>152</sup>—all of

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Lucas gives an overview of the doctrinal debate between various scholars and courts from the 1990s up to the *Jurisdictional Immunities* decision by the ICJ. One party held to Italy's position as argued before the ICJ, that conflict with a norm of *jus cogens* status is defined as existing whenever the *application* of a peremptory norm is restricted by the operation of another principle or whenever the operation of a principle of international law is to render a peremptory norm incapable of producing legal consequences. The other party asserted a more traditional and horizontal approach to international law according to which only that which directly conflicts with the substantive content of the norm would qualify as contrary.

<sup>147</sup> *Ferrini v. Federal Republic of Germany*, decision No. 5044/2004, International Law Reports (ILR), Vol. 128, p. 658.

<sup>148</sup> Cited in *Jurisdictional Immunities case* at 115—166, para. 33—35.

<sup>149</sup> *Jurisdictional Immunities* at 140, para 93.

<sup>150</sup> *Al-Adsani v. United Kingdom* [GC], application No. 35763/97, Judgment of 21 November 2001, ECHR Reports 2001-XI, p. 101.

<sup>151</sup> *Kalogeropoulou and Others v. Greece and Germany*, Application No. 59021/00, Decision of 12 December 2002, ECHR Reports 2002-X, p. 417.

<sup>152</sup> *Jones v. Saudi Arabia*, House of Lords, [2007] 1 AC 270 ; ILR, Vol. 129, p. 629; Canada (*Bouzari v. Islamic Republic of Iran*, Court of Appeal of Ontario, DLR, 4th Series, Vol. 243, p. 406 or ILR, Vol. 128, p. 586); Poland (*Natoniowski*, Supreme Court, Polish Yearbook of

which declined or failed to rely on *jus cogens* to deny sovereign immunity to a state in a civil suit before a municipal court of another state. Importantly for this discussion, however, the court did look upon *jus cogens* as having a limiting effect on all norms, in the sense that it disallows any rule whose effect is to contradict the substantive prohibition of the peremptory norm.<sup>153</sup>

To the court, the impact of the *jus cogens* is in its substantive content. That is, in the determination of the legal status of simple acts of states that come directly under its prohibition or compulsion. As such, contradiction of *jus cogens* exists only where there is competition between a peremptory norm and a non-peremptory norm in conferring legal status to the specific conduct (of a state) in question. This of course seems to match quite well the meaning of “conflict” given in the ILC’s conclusion 2 in its study on fragmentation cited earlier, according to which, contradiction or conflict comes down to a situation where “opposite decisions” derive from the application of two norms, thus forcing a choice to be made between them. Again, in the Court’s words,

“recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule....”<sup>154</sup>

Indeed, the court had emphasized throughout that case that the illegal nature or status of Germany’s conduct at the relevant time was not in question: Murder, ill-treatment and deportation to slave labor of civilians in occupied territory or prisoners of war<sup>155</sup> remained serious breaches of international law. Germany had fully accepted both the

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International Law, Vol. XXX, 2010, p. 299); Slovenia (case No. Up-13/99, Constitutional Court of Slovenia); New Zealand (*Fang v. Jiang*, High Court, [2007] NZAR, p. 420 or ILR, Vol. 141, p. 702) and Greece (*Margellos*, Special Supreme Court, ILR, Vol. 129, p. 525.

<sup>153</sup> In that view, *jus cogens* would seem to potentially transform the very structure of international law. For example, following this reasoning to its full logical consequences, all treaties would have to be judged in terms of their *potential* to block the application or enforcement of *jus cogens* and not just in terms of their conformity with substantive prohibitions or obligations of *jus cogens* status.

<sup>154</sup> *Ibid.*

<sup>155</sup> Nuremberg Charter, article 6 (b) (War crimes).

illegality of the acts in question and the duty to make reparations for them (while insisting on having fully met its obligation to pay for reparation in relation to the said violations of IHL). But for the ICJ, what mattered was the fact that there had been no principle proposed for application in either *Ferrini* or before itself that purported to classify Germany's conduct in the war as legal or permissible in international law.

The ICJ also cited the procedural nature of sovereign immunity in contrast with the substantive nature of the *jus cogens* norm as crucial.<sup>156</sup> The two sets of norms “address different matters”,<sup>157</sup> namely: a) jurisdiction—whether one state had jurisdiction over the subject matter or over the defendant state in the municipal case (sovereign immunity); and b) the legality of specific acts in armed conflict—whether these acts were permitted or not (substantive IHL rules).<sup>158</sup> The other means considered by the court by which a conflict could arise was if the application of that principle of state immunity amounted to “rendering aid and assistance in maintaining”<sup>159</sup> a situation caused by the breach of a *jus cogens* rule, per article 41 of the Draft Articles on State Responsibility.<sup>160</sup>

### **“Aid and assistance”**

The ICJ found that no “aid or assistance” to support the results of a breach of *jus cogens* had been rendered in the *Ferrini* case. This was despite the fact that applying the rule on state immunity would have effectively ensured that the personal injury to Mr. Ferrini (a situation directly caused by German violation of the rules of war) would remain unrepaired. It would seem at first glance that such could be interpreted as assisting Germany in maintaining a situation caused by a breach of *jus cogens*. From Italy's perspective, recognizing Germany's immunity could be seen as coming into direct conflict with Italy's own substantive obligations regarding the relevant peremptory

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<sup>156</sup> *Jurisdictional Immunities* at 140, para 93.

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*

<sup>160</sup> Article 41 provides, “No State shall recognize as lawful a situation created by a serious breach within the meaning of article, nor render aid or assistance in maintaining that situation.”

norm—a conflict between the duty that Italy owes to Germany on a bilateral basis (state immunity), and the one it owes *erga omnes* under peremptory norms of IHL.

The court did not provide an argument for its finding regarding this particular form of conflict with *jus cogens*, but it did emphasize that the duty to make reparation was entirely distinct from the peremptory norm itself and considered that no rule existed in international law requiring that compensation be made in full.<sup>161</sup> It is clear then, that to the court, the “situation” caused by a breach of *jus cogens* (that must not be maintained) does not include the injuries suffered by victims of violations of peremptory norms—at least, not on an individual basis.

In fact, the commentary to article 41 gives examples of the kinds of “situations” referred to:<sup>162</sup> The continued occupation of land that has been taken contrary to rules of *jus ad bellum*;<sup>163</sup> and the continued denial of the right of self-determination of peoples (apartheid and colonial rule).<sup>164</sup> Such a situation must not be given recognition, either formally or impliedly.<sup>165</sup> The court evidently understands the rule in article 41 as referring to continued breaches of the norm itself and not simply any “situation caused by the breach of *jus cogens*.” In essence, for conflict in the manner of “aid and assistance”, the right or value protected by the peremptory norm continues to be denied, violated or threatened.

## **II. Applying the principles of normative conflict to inter-temporal law and *jus cogens***

Besides the matter of aid and assistance, other factors considered key in determining whether a conflict arises between an ordinary legal principle, rule or norm and one that is *jus cogens* discussed above were: a) Whether a principle of international law purports to render legal the substantive prohibitions of the norms of *jus cogens* (or alternatively,

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<sup>161</sup> *Ibid* at 140, para 94.

<sup>162</sup> Commentary on Draft Articles (State Responsibility), at 114—115.

<sup>163</sup> *Ibid* at 114, para 5—7.

<sup>164</sup> *Ibid* at 115, para 8.

<sup>165</sup> *Ibid* at 114, para 5.

whether it purports to render *illegal* the substantive compulsory requirements of the norms of *jus cogens*); b) Whether the claimed conflicting norms are of the same nature, or deal with the same matter in contradictory ways. Hence, if one is substantive and the other procedural, establishing contradiction is impossible. From conclusion 2 on the ILC fragmentation study, the factors were: a) the presence of two norms of international law; b) the requirement that both norms be valid and applicable in the relevant subject matter; and c) the requirement that the two norms point to incompatible decisions, forcing a choice to be made between them. All these factors have been distilled into the two sections discussed below.

**a) The duality of *jus cogens* and inter-temporal law: substantive and procedural elements**

Comparing inter-temporality with *jus cogens* is difficult because the concepts entail two intertwined aspects that are relevant to the court's reasoning in *Jurisdictional Immunities*. In inter-temporal law, there is inter-temporality itself and the past substantive norm that inter-temporality brings forward for application in the present. But there are two elements to *jus cogens* as well. One concerns the relationship between *jus cogens* and the "simple act" referenced in chapter two—the substantive issue. Thus, aggression, genocide, torture, slavery, colonialism, and violations of *jus in bello*, are all unconditionally prohibited. No state must regard itself as having the option of committing any of these acts in any circumstances whatsoever. But the other element concerns the relationship between the peremptory norm and other legal rules and principles (non-derogability). While the former deals with the lawfulness of a certain *act*, the latter deals with lawfulness of a certain *law*.

Essentially, the relationship between each of the above elements and *jus cogens* must be considered. This is because, while the matter took place in the distant past, its determination occurs in the present where a tribunal has before it several substantive norms from different time-periods dealing with the same question. Inter-temporality, in the strict sense in which it was understood by the ILC in the Draft Articles on State

Responsibility, is a rule that unconditionally directs the tribunal to pick the older norm over the latter one wherever a question of state responsibility is involved.

Because of the dual nature of both inter-temporal law and *jus cogens*, it seems impossible to neatly separate the substantive and the procedural elements in determining whether a contradiction exists, as the ICJ did on the sovereign immunity question. Both concepts seem to entail secondary rules or procedural elements in determining a hierarchy or choice between norms, as well as substantive elements. The court's method of distinguishing and separating norms into their proper spheres through considering which questions they deal with (or which matters they address) is helpful, but as seen below, is not so straightforward in the matter of inter-temporality.

Here, it is asked whether inter-temporality and the peremptory norm ask and answer the same question. At first glance, it appears that they obviously do not. Inter-temporality asks: which law should apply (secondary rules)? And the court in *Jurisdictional Immunities* appears to suggest that all that the *jus cogens* norm asks is whether an act is lawful (substantive rule). But as seen above, both these views are restrictive.

The inter-temporal principle, as said above, involves a choice between substantive norms, one of which—in the present case—has the quality of non-derogability. Non-derogability of *jus cogens* is itself a choice of laws issue like inter-temporality, only that it provides an answer contrary to that provided by inter-temporality. A choice of laws of its very nature is presumptive of the existence of a direct contradiction, clear from the fact that the two norms or sets of laws are mutually exclusive, one necessarily giving way to the other, and it is this inherent contradiction that necessitates the choice between them in the first place.

Indeed, where *jus cogens* is involved, the question must arise as to whether the very asking of the question asked by inter-temporal law (which law?) itself entails an immediate contradiction of the *jus cogens* norm. Put differently, asking “which law” between a *jus cogens* norm and another seems to be the very question that non-

derogability attempts to exclude *a priori*. Essentially, non-derogability seems to give a direction to the tribunal that is contrary to the direction the tribunal receives from inter-temporality: It says that whenever one is forced to ask “which law” applies between *jus cogens* and another norm, the answer is always *jus cogens*—which of course implies that inter-temporality always contradicts *jus cogens*.

Moreover, in the case of state immunity, the court had indicated that the procedural question comes before the substantive determination<sup>166</sup>—so that the two avoid each other and never come into direct conflict. From the above, however, it seems that the dual nature of both principles, the status of *jus cogens* as superior to contrary laws and the nature of inter-temporality as a method of choosing between substantive norms makes that linear methodology unworkable. The solution ends up looking circular because the superiority of *jus cogens* seems to provide a ready answer to the question posed by inter-temporal law (which law?) rendering inter-temporality meaningless wherever *jus cogens* is involved.

#### **b) Two norms leading to incompatible decisions**

A difference is apparent between international law as it stands at present and in the past: one contains an explicit, universally binding prohibition against torture that the other does not. Indeed, between *Filartiga vs Pena- Irala* (1980) and the law of the 1950s, as was reviewed in chapter one, this difference is clear. But does such a difference amount to a contradiction between two norms? Which two norms? And does it matter? Per conclusion 2 on fragmentation, conflict is based on the presence of two contrary norms. But such a “contradiction” as exists in general international law between 1950 and 1980 may lie merely in the difference between the presence of a positive prohibition of certain conduct and its absence. But can mere absence of a rule count as a “contrary” norm, against which a peremptory norm must not be permitted to yield? How could mere absence be tested against the peremptory norm on torture as a contradiction, when this *absence* is in fact, no norm at all?

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<sup>166</sup> *Jurisdictional Immunities* at 140, para 93.



It is difficult to say whether there was a customary rule specifically authorizing use of torture by states in the 1950s and the time before. As reviewed in chapter one, modern international law in this area was only just developing. Given, however, that it was developing in the direction of a clear prohibition of torture, it is doubtful that such a custom, if present before the war, continued after it. What is clear is that there was no clear, positive, universally binding prohibition of torture immediately after the war. As seen above, the court seems to take it for granted that “contradiction” refers to a situation where a norm declares lawful what *jus cogens* renders unlawful or vice versa. Hence the need to find the contrary norm in the law of the early 1950s against which the peremptory prohibition of torture is compared.

The ICJ in the *Lotus case* stated a general principle in international law by which states are permitted to do whatever is not explicitly prohibited by a rule of international law—variously called the *Lotus* “rule”, “presumption” or “principle”.<sup>167</sup> This decision is controversial and has been criticized by both scholars and ICJ judges for its implied support of an absolute state sovereignty.<sup>168</sup> For the purposes of this discussion, however, and regardless of the truth of the principle, the fact remains that if a tribunal were to hold today that the *Mau Mau* tortures were lawful per the general international law of the early 1950s, they would essentially be asserting the same principle as the *Lotus*. At the very least, therefore, there would be a contradiction between this *Lotus* principle that presumably permitted states to conduct torture in 1952 and early 1953, and the current peremptory norm prohibiting the same, both of which are on the table in the case of a tribunal hearing the matter today.

On the other hand, regardless of the question of the identity of the norm actually responsible for the contrary result, the fact is that a judicial body applying the inter-temporal principle in evaluating the legal status of acts of a distant past will generally “recognize as lawful”, acts that may otherwise be unlawful when judged through the law

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<sup>167</sup> Hernández G (2013) *The International Court of Justice and the Judicial Function*, Oxford University Press, 263—266.

<sup>168</sup> *Ibid.* Also, the *Nuclear Weapons case*.

prevailing at the time of the determination of the case and vice-versa: Should it matter whether there is an identifiable norm in direct contradiction—that is, a norm that more directly states that torture is permissible—if the results of the operation of whatever norm in the circumstances is a declaration that the very subject matter that the *jus cogens* norm prohibits is lawful?

Indeed, conclusion 2 above refers only to “incompatible decisions” of two norms of international law. Certainly, inter-temporal law does not deal directly with any subject that any recognized peremptory norm deals with. It does not, for example, provide that torture is acceptable (in any era). This, however, is the direct result of its application. Thus, it fits the essence of conflict as explained—where the result of the application of a norm is incompatible with that of the application of another. It thus seems that it should not matter what kind of norm is responsible for the result, as long as the contradictory result is the product of the operation of a non-peremptory norm. Thus, if neither the absence of a rule, nor the *Lotus* presumption is adequate to serve as the second contrary norm required for a finding of a normative conflict in favor of *jus cogens*, inter-temporality itself would surely qualify: its application leads to the same contrary result.

Indeed, Lammasch’s position referenced in chapter two bears repeating: Where an international tribunal finds itself having to render a decision that at the time of the judgment seems positively opposed to the prevailing public morals, “for example, to recognize the slave-trade as an acceptable commercial practice”,<sup>169</sup> the tribunal is authorized to abandon the principle leading to the unacceptable conclusion and to instead apply higher legal principles and equity.<sup>170</sup>

### III. Conclusion

As seen above, a normative conflict can be demonstrated between inter-temporal law and a particular peremptory norm to the extent that the two norms by and large meet the two

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<sup>169</sup> Bjorge, citing Lammasch at 166.

<sup>170</sup> *Ibid.*

sets of criteria discussed above: The ILC's principles in its study on fragmentation and those extracted from the *Jurisdictional Immunities case*. This however is true only if the peremptory norm is relevant to the dispute in its own right, such that were it not for its displacement by inter-temporal law, its operation would be automatic.

On the other hand, if peremptory norms are not applicable in themselves—if they began at an identifiable point of time *after* the acts, for example, and are prospective in nature only—then no automatic conflict can be presumed. The peremptory norm simply would not apply of its own nature, rather than because of displacement by an inferior norm. Its application to the said events would, as opined by the ILC, depend on the volition of the states and not arise from its peremptory nature. This is the issue of “validity and applicability” left for discussion in chapter four.

## CHAPTER FOUR: THE WIDE TEMPORAL SPHERE OF *JUS COGENS*—ARGUMENTS FROM MORALITY

In terms of the ILC criteria for normative conflict, “validity” means that the two norms “each cover the facts of which the situation consists,”<sup>171</sup> while applicability means having “binding force in respect to the legal subjects finding themselves in the relevant situation.”<sup>172</sup> Thus, for a normative conflict to exist between *jus cogens* and intertemporality, *jus cogens* must be relevant to the particular dispute in question, *in its own right*, and on the basis of its own legal character, independently of the relations that may exist between itself and any other norm. But therein lies the problem. *Jus cogens* is a largely ambiguous concept. Save for the three characteristics of non-derogability, universality and superiority of its norms, little else has been definitively or satisfactorily settled about the nature and scope of *jus cogens*. The question that the requirement of validity and applicability asks—whether *jus cogens* in its own right applies to the acts in question—is therefore not easily answered.

### “Anachronism”

Dinah Shelton has described as an “anachronistic analysis,” Haunani-Kay Trask’s claim that human rights enshrined in the UDHR were violated in 1893.<sup>173</sup> Trask justifies his own argument thus,

“We must all remember that the ideal of universal self-determination is a settled principle of peremptory international law, superseding customary rules and bilateral treaties. The principle of self-determination is of sufficient importance to be applied retroactively to relationships among states and peoples before the adoption of the 1948 United Nations Charter.”<sup>174</sup>

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<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*

<sup>173</sup> Shelton (Reparations for Indigenous Peoples) at 63.

<sup>174</sup> Trask HK ‘Restitution as a Precondition for Reconciliation: Native Hawaiians and Indigenous Human Rights’ (2002) 2 *Borderlands E-Journal* 2.

Indeed, in the approach followed in this paper thus far, it has seemed that the law has been made to work backwards. The arguments made seem to lead unavoidably to the criticism that a state is here being charged with having violated a non-existent international norm. But perhaps the problem lies in understanding “international law” too narrowly. As referenced earlier in chapter one, Shelton, for example, says:

“A very few authors have tried to invoke the concept of *jus cogens* to give retroactive effect to certain norms. However, this involves giving the concept of *jus cogens* itself retroactive effect, because its inclusion in the Vienna Convention on the Law of Treaties represented progressive development not codification of international law.”<sup>175</sup>

For her, the very concept of *jus cogens* as a legal reality is a product of the VCLT (either in 1969 when it was adopted or in 1980 when it came into force). It did not exist as international law prior to it. Considering that the VCLT (the origin of the legal doctrine of *jus cogens*, per this view) is itself explicitly non-retroactive (articles 4 and 28), she considers that any attempt to associate peremptory norms with the past is inescapably anachronistic. But is it true that *jus cogens* had no legal validity prior to the VCLT?

This chapter explores this question and more as it discusses the temporal scope of application of *jus cogens* in general, and of individual peremptory norms in particular. It is argued that peremptory norms, particularly those of a purely humanitarian character, enjoy or, at least should, enjoy a wide temporal scope of application in international law.

## **I. The temporal origins of *jus cogens* in the VCLT**

Dorr & Schmalenbach’s conclusion on the effect of the VCLT (and its non-retroactivity) on peremptory norms is opposite to Shelton’s described above. For them, the development

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<sup>175</sup> Shelton, at 63.

introduced by the VCLT is the very idea that *jus cogens* lacks retroactive effect,<sup>176</sup> which is the common interpretation of article 64 of the VCLT. That article provides,

“If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”

Hence, per Dorr & Schmalenbach, peremptory norms that existed prior to the coming into force of that convention (1980)—which most assuredly would include torture, considering that *Filartiga* was itself from the same year<sup>177</sup>—are not subject to the Convention’s notion (as commonly interpreted) in article 64.<sup>178</sup> However, he leaves room for the possibility that the rule in article 64 may have been a codification of international law.

But Magallona notes that the VCLT’s non-retroactivity would affect both article 53 (which introduces the *jus cogens* concept to the regime of the VCLT) and article 64.<sup>179</sup> Thus, the “new peremptory norm” of article 53 would refer only to norms that emerge after the VCLT itself (or from 1980). He thus concludes that neither treaties nor peremptory norms that pre-existed the convention could be affected by article 64.<sup>180</sup> In short, the VCLT principles do not govern the relationship between peremptory norms and contrary treaties for the entire period of international law that preceded the VCLT itself. Therefore, articles 53 and 64 did not represent a general principle, codification or even a clarification of the law, but established a new legal regime.

But there is the problem, with this view, of the VCLT’s relationship to the older treaties and norms in the period *after* the VCLT had come into force. Article 64 provides that contrary treaties terminate at the point of emergence of a new peremptory norm. But the

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<sup>176</sup> Dörr O & Schmalenbach K (2011) *Vienna Convention on the Law of Treaties: A Commentary* (2011)

Springer Science & Business Media, 1121—22.

<sup>177</sup> Along with at least Genocide, slavery and IHL.

<sup>178</sup> Dorr & Schmalenbach, at 122.

<sup>179</sup> Magallona, MM ‘The Concept of Jus Cogens In the Vienna Convention on the Law of Treaties’ (1976) 51 *Philippine Law Journal* 521, at 537—538.

<sup>180</sup> *Ibid.*

view above does not accept that any norm was peremptory prior to the VCLT. Hence, it is clear that in 1980, when the convention came into force, the older treaties would be subject to article 64 which deals with them directly. But what about the individual peremptory norms? If the commonly recognized peremptory norms did not exist (at least not as peremptory norms) prior to the VCLT, *when* can they be taken to have come into existence so as to terminate the contrary treaties dealt with by article 64?

Magallona argues that the older peremptory norms only became peremptory upon the application of article 53 to them. This could only have happened in 1980 when the Vienna Convention came into force. It is only at that time that these norms could be considered as “recognized by the international community as a whole” per article 53. Therefore, per this view, the law on genocide, slavery, *jus in bello* and *jus ad bellum*, all became “new peremptory norms” in 1980 by operation of the VCLT and were only ordinary norms of international law before then.

It is hard to follow this logic, not only because of its complexity but because the VCLT itself does not recognize any particular peremptory norm. How then is it concluded that the said norms became peremptory upon the coming into force of the VCLT? It seems that this view implicitly acknowledges that prior to the VCLT, these older (now peremptory) norms indeed fit the formula of article 53 in that they were “recognized by the international community as a whole as norms from which no derogation is permitted.” The claim thus appears to be that this recognition only became legally significant once the *jus cogens* concept had been adopted and proclaimed in the VCLT. But if such norms were recognized “by the international community as a whole” as non-derogable, this fact must at least have had significance in customary or general international law—in which case, the VCLT could only codify and not create the legal doctrine of *jus cogens*.

There is also the problem of non-member states to the Vienna Convention. From the VCLT-centered approach to *jus cogens* described above, it would seem that the VCLT’s provisions could not bind non-member states in any way even after 1980. But as Verdross argued in response to Schwarzenberger’s assertions of the same view, a

peremptory norm that is supposedly binding on treaty members *inter se* only, is no peremptory norm at all.<sup>181</sup>

The solution that Magallona provides is that the VCLT introduced a “new legal order” in international law.<sup>182</sup> But it is hard to distinguish this from an attempt to constitute VCLT member-states as a legislative body capable of binding all subjects of international law, whether they are members to the convention or not. This is unjustifiable, even—or especially—from a positivist approach which cannot abide any idea of one state exercising legislative authority over another without the other’s consent.

Moreover, Verdross wrote in 1937,

“every juridical order regulates the rational and moral coexistence of the members of a community. No juridical order can, therefore, admit treaties between juridical subjects, which are obviously in contradiction to the ethics of a certain community.”<sup>183</sup>

Such treaties would be *contra bona mores*—“contrary to good morals.”<sup>184</sup> According to Verdross, this principle was indisputably recognized in international law and part of the general principles of law recognized by civilized nations when he wrote his essay in 1937. In that case, there would be no reason why articles 53 and other VCLT articles on peremptory norms should be viewed by Shelton and others as developments rather than codifications of the law. The implication of their view is that nothing that happened before 1980 matters as far as the legal ramifications for the characterization of a norm as *jus cogens* goes, but this does not seem properly justified.

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<sup>181</sup> Verdross A, ‘Jus Dispositivum and Jus cogens in International Law’ (1966) 60 *The American Journal of International Law* 1, 55—63.

<sup>182</sup> *Ibid.*

<sup>183</sup> Verdross A, ‘Forbidden Treaties in International Law’ (1937) 31 *American Journal of International Law*, 571, at 572.

<sup>184</sup> Chadman EC, *A Concise Legal Dictionary* (1909) at 113.



It is clear from the above that the view that *jus cogens* is—legally-speaking—the product of the VCLT is at best controversial. If indeed the VCLT has authority regarding its provisions on peremptory norms, this authority must come from the content of the norms themselves, whose general form must be taken as only having been codified in the convention. The universal, binding authority of peremptory norms cannot be based on the group of states that acted in the VCLT formation and adoption, for these states simply have no authority in international law to bind other equally sovereign states. Hence, to claim that the VCLT virtually created *jus cogens* seems tantamount to denying the very concept of *jus cogens*.

What the VCLT did should rather be seen as a final resolution on the *jus cogens* debate (by international consensus) in favor of the camp that had always argued for a place for *jus cogens* in international law against rigid positivism. Thus, the VCLT is hereafter treated only as a codification of the international law on peremptory norms and not its ultimate source or origin.

What, then, is the relationship of *jus cogens* with time beyond the authority of the VCLT? More particularly, what is the temporal scope of individual peremptory norms—like the prohibition of torture, for example?

## **II. Origins of peremptory norms beyond the VCLT: The role of morality**

In his essay mentioned above, Verdross went on to extrapolate from his explanation of an existing compelling law, a system by which the individual “essential” norms he referred to could be identified. His method was based on equality of states and what he called “tasks” of states, such that any norm is impermissible which purports to deny states this essential quality of equality or to prohibit in some form, the performance of a state’s tasks. In his own words,

“the analysis of these decisions shows that everywhere such treaties are regarded as being *contra bonos mores* which restrict the liberty of one

contracting party in an excessive or unworthy manner or which endanger its most important rights.”<sup>185</sup>

He starts from a premise of both essential rights (equality) as well as responsibility (tasks). These responsibilities, interestingly, have to do with a state’s relationship with its own people and not with the community of states. Regardless—and crucially—such responsibilities form the basis of the state’s relationship with other states in international law, by providing the limit beyond which other states cannot legally interfere with that state through treaties or custom. These state “tasks” and essential rules he derives from general principles of law recognized by civilized nations as it was defined in the Statute of the Permanent Court.<sup>186</sup> Hence, Verdross already concluded before the beginning of the 2<sup>nd</sup> World War and the international order it introduced, that treaties would be null and void where they purported to:

- i) Bind a state to harm its citizens directly or to limit essential services to them such as the provision of hospitals, schools and other such essential services, or to otherwise subject its people to suffering.
- ii) For whatever purposes, limit a state’s capacity for its police or protective services to such levels that its population was exposed to anarchy and disorder.
- iii) Limit a state’s armed forces such that it was incapable of protecting its right to exist.
- iv) Limit a state’s capacity to protect its citizens abroad. However, this is limited where another state has taken over the duties, such as where the citizen is an alien in another state.

His schema does not limit a state’s capacity to enter agreements that transfer the duty of performance of these tasks to other states, such as is the case in protected states.<sup>187</sup> Instead, it limits a state’s capacity to annihilate that “right” of performance of essential

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<sup>185</sup> Verdross at 574.

<sup>186</sup> League of Nations, *Statute of the Permanent Court of International Justice*, 16 December 1920, article 38 (3).

<sup>187</sup> *Ibid* at 575.

tasks completely. Therefore, the tasks/duties themselves are indestructible. The state only has enough leeway to delegate them to another, but never to destroy them.

It may be argued, however, that the tasks in his schema are not necessarily converted into duties that the state owes to other states. They are presented mainly as essential rights of each state that cannot be taken away through custom or treaty. Hence, a state has a right in international law to carry out certain tasks as regards its people, and such a right cannot be taken away through agreement or custom, except where another state takes over the same tasks.<sup>188</sup> Yet, the very limitation placed on a state from exposing its citizenry to harm by consenting away its responsibilities shows that contrary to the rhetoric, international law was indeed concerned with the welfare of the subjects of states on a certain, basic level. In fact, it seems that Verdross identifies the very nature of a state with the performance of these essential tasks, such that any treaty purporting to take them away would do something akin to requiring an individual to commit suicide or murder his own children (by way of analogy) and thus constitute an unconscionable intrusion into the state, contrary to the basic morals of the community to which it belongs.<sup>189</sup>

Indeed, the fact that the Nuremberg Charter included “crimes against humanity” covering atrocities carried out against German peoples is further proof that this very basic morality incumbent on states on this primary level was a presumption inherent to the understanding of international law among legal subjects of international law at that time.

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<sup>188</sup> By analogy to a human being, such agreements could be compared to agreements requiring a person to forgo essential tasks of human beings, such as feeding oneself or ones children, for example, without providing an alternative means for the fulfillment of those needs. The municipal order intervenes to prevent such agreements through various laws. International law at the time in which Verdross wrote—and to a certain extent, even today—lacked that full development of its ethics in clear and unambiguous positive rules or norms that were to make their debut following the tragedies of the war.

<sup>189</sup> The difficulty would be to show that some form of duty of reparation—or the right of other states to sanction a state—could legally follow contravention of those basic tasks of a state. However, the law of state responsibility, as defined by the ILC, only requires that the law itself be in force at the time. There is no requirement that inter-temporal law apply to the rules on reparation.

Schwarzenberger, whose positivism goes further than anything discussed here so far, utterly denies that a concept such as *jus cogens* could possibly exist in “unorganized international society”.<sup>190</sup> For him, such a concept could truly only exist in a body with an organ having capacity to impose rules and secure compliance thereof. This would be accomplished either through belief in some form of supernatural authority (what he calls the function of the “lawyer-priest”<sup>191</sup>) or through a truly centralized body headed by a powerful organ. He therefore says of such essential tasks as Verdross described above, that they constitute only minimum standards of civility. His solution to the, fact that an absolutely positivist approach allows states, in principle, to contract the immoral treaties described in Verdross’s schema, is that states willing to enter such agreements would in so doing prove that they had sunk so far below recognized standards of civilization that they could no longer be counted as part of “civilized nations”.<sup>192</sup> There would then be no reason for other states to treat such rogue or “outlaw” states<sup>193</sup> as proper states.

But this seems to concede that such standards are minimum requirements in international law—if indeed violating them should result in such serious consequences as stripping a state of any legitimacy or state-rights whatsoever, labeling it rogue and an outlaw vis-à-vis the international community. For why should standards of civility matter at all if states are truly free to do whatever they will to do as long as prior engagements and *pacta sunt servanda* are given their due respect?

In fact, Schwarzenberger’s standards of civility are indistinguishable in their practical effects from *jus cogens*, for the loss of such state-rights would render the immoral agreements entered by these states dead on arrival as far as other states are concerned (thus, practically invalidating them). Indeed, Schwarzenegger’s position would seem to go even further in its consequences than *jus cogens* requires, especially in view of the ICJ’s very limited view in its decision in the *Jurisdictional Immunities case*. His solution

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<sup>190</sup> Schwarzenberger G 'International Jus Cogens?' (1965) 43 *Texas Law Review* 455, at 476.

<sup>191</sup> *Ibid*, at 467, 468.

<sup>192</sup> *Ibid* at 465.

<sup>193</sup> *Ibid*.

also raises questions of whether other states would then have a right to use force against such an entity (outlaw) without violating any treaty or customary norms.

In any case, the ILC in the commentary on the Draft Articles on the Law of Treaties before the adoption of the VCLT had rejected this strict positivist approach in matters of *jus cogens*. It stated that the view that “there is no rule of international law from which States cannot at their own free will contract out has become increasingly difficult to sustain.”<sup>194</sup> Indeed, Parker & Neylon note that the evidence in practice showed that states usually act under a general presumption that all law is *jus dispositivum* or positive law, until they run into an unjust law—at which point they seem to drop the assumption.<sup>195</sup> This may have happened with international law after the Nazi atrocities in World War II.

In addition to Schwarzenberger’s treatment of “barbaric” treaties or his recognition of commonsensical “standards of civilization,” two things can be concluded from Parker & Neylon above: a) *Jus cogens* is highly exceptional—the general rule of international law is in fact, positive law. b) *Jus cogens* is, essentially, no more nor less than international morality and ethics. While indeed a legal concept, it nonetheless entails a moral judgment on values,<sup>196</sup> hence the Special Rapporteur’s statement that peremptory norms “involve not only legal rules, but considerations of morals and international good order.”<sup>197</sup>

State responses to “unjust laws” as described by Parker & Neylon and even Schwarzenberger above (though the latter only sees them as matters of common sense and not legality *per se*) cannot logically be presumed to be baseless. Such a response to the actions of other sovereign states must arise out of an already present set of commonly-held (possibly universal) beliefs that had simply been taken for granted without much conscious thought or need for explanation before their violation. They are

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<sup>194</sup> ILC (Draft Law on Treaties commentary) at 247, para 1.

<sup>195</sup> Parker K & Neylon LB ‘Jus cogens: the Compelling Law of Human Rights’ (1988-89) 12 *Hastings International and Comparative Law Review* 411; Verdross (Jus dispositivum and Jus cogens) also noted that *jus dispositivum* was the general rule, though *jus cogens* exists as well.

<sup>196</sup> Orakhelashvili at 48—50.

<sup>197</sup> *Ibid*, and at *Yearbook of the International Law Commission*, (1953) Vol. II, 155.

moral presumptions. It is only in this way that the notorious capacity of some *jus cogens* crimes to “shock the human conscience” makes sense.

Indeed, the legal language used to describe some of the recognized peremptory norms seems clearly to invoke morality as the ground from which the norms stem. The common use of phrases such as the above-mentioned “crimes that shock the human conscience”, or “crimes against humanity” is moral language and the very concepts of “humanity” or “human conscience” are inseparable from morality. *Jus cogens* is thus a way by which international law makes basic morality legally significant.

As fundamental morals of the international community, it would seem that peremptory norms cannot all be the product of simple state-will—even cumulative or collective state-will. They defy the normal categories of law that find its roots in a clear expression of legislative authority (in international law terms, in state-consent) identifiable at specific points of time. Indeed, binding morals within clear temporal limits seems a difficult task. As argued below, it would rather be deemed that they co-exist with the interest they immediately protect, for peremptory norms are expressions of the fundamental interests of the community or indeed the species “as a whole” as these interests are communicated on a global, political platform of state relations.

What then is to be made of the language of article 53 of the VCLT, which seems to imply that, to the contrary, these norms are in general, intentionally created and therefore capable of being placed within definite temporal bounds?

### **III. Article 53 of the VCLT: The creation vs. identification debate**

According to the ILC, article 53 of the Vienna Convention presents “stringent” criteria for the identification of peremptory norms. This article requires that the norm in question fulfil two criteria: a) recognition as a norm of general international law, “binding as such”; and b) recognition as having a peremptory character (being non-derogable) by the

international community of states as a whole.<sup>198</sup> The ILC then lists the “relatively few peremptory norms” that meet the criteria (the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture; and the right to self-determination<sup>199</sup>).

In the case of torture, both criteria above were met rather late. A principle against torture clearly existed in general terms immediately after the Second World War or this prohibition would not have found its way into the UDHR, 1949 Geneva Conventions, the ECHR or the UN Charter. But as seen earlier, the position of this principle was very weak from a positivist perspective. Of the four instruments, only the Charter (the least explicit about torture) was in force and binding for Great Britain at the relevant time. Therefore, at best, this principle was “soft law” in terms of the general international law of 1952 and early 1953. At that time, it was recognized neither as a norm of general international law “binding as such”, nor as peremptory. It would become a clear positive and explicitly-binding rule of general international law after a few years had passed and states had had the opportunity to clearly express their *opinio juris* on the matter in the various ways recounted in *Filartiga*.

According to the *Lotus* presumption mentioned earlier, only explicit expressions of state belief about the law count as international law. But, again, this principle is noted for its highly controversial nature. It appears to have been rejected by the ICJ in *Nuclear Weapons*, only to be relied upon again in *Kosovo*. Judges Higgins, Kooijmans and Buergenthal have said that the principle represents “the high water mark of *laissez-faire* in international relations and an era that has been significantly overtaken by other tendencies,”<sup>200</sup> and Judge Simma remarked that it reflected legal reasoning “redolent of 19<sup>th</sup> century positivism.”<sup>201</sup> Hernández notes that while—as a matter of “judicial and

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<sup>198</sup> ILC (State Responsibility, commentary) at 85, para 5.

<sup>199</sup> *Ibid.*

<sup>200</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 2002 I.C.J. (February 14) 78, para 51.

<sup>201</sup> *Kosovo case*, at 478, 480, para 8.

doctrinal policy”<sup>202</sup>—the *Lotus* principle has been in general rejected, it cannot be completely dismissed. Rather, it might be read as a rebuttable presumption in favour of national sovereignty as a residual principle.<sup>203</sup> In any case, *jus cogens* must be seen as an exception to this proposition as it is not itself a part of *jus dispositivum*, the expression of which the *Lotus* principle is.

As discussed above, there are certain ethics that exist in the background and without clear expression until they have been grossly violated and provoked a response in the field of international relations, which response comes in the form of new positive acts. Hence, Cassese and Lauterpacht both are of the view that even if the rules have not yet sufficiently crystallized or they remain unclear, they may still be “legally effective” because of their “moral and psychological weight.”<sup>204</sup> Like all legal systems, international law is built on a certain ethical foundation, the nature of which is not always explicit, save only to the extent that it is based on a common humanity (formally, it was only a common “civilization”). What then is the effect of this late recognition of torture as peremptory in light of the ILC’s criteria above?

The ILC’s explanation of article 53 in the VCLT seems to be of a process of identification. Identification is not creation—though the ILC does explain elsewhere that article 53 recognizes the possibility of creating peremptory norms and the special place of states in such a process as “par excellence the holders of normative authority on behalf of the international community.”<sup>205</sup> Again, this only allows at most that some currently recognized peremptory norms may be products of such a process of creation, or it may simply refer to the possibility that a peremptory norm not yet in existence may be legitimately created in the future through the agency of the “international community of states as a whole.” What it does *not* require is the conclusion that all currently recognized peremptory norms have been created by such a process.

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<sup>202</sup> Hernández (Judicial Function) 264—265.

<sup>203</sup> *Ibid* at 265—266.

<sup>204</sup> Orakhelashvili at 49, 50, citing Lauterpacht (*Yearbook of the International Law Commission*, 1953, Vol. II, 155) and Cassese (*Self-Determination of Peoples* (1994), 174).

<sup>205</sup> *Ibid* at 56, para 7.



Indeed, according to the ILC itself, peremptory norms are not peremptory only by designation, but also because of their substantive content and their relationship with wider (and fundamental) interests of the international community. Thus,

“A rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority.”<sup>206</sup>

Similarly, peremptory norms,

“prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.”<sup>207</sup>

And to the international court, some principles

“are fundamental to the respect of the human person and “elementary considerations of humanity””<sup>208</sup>

Therefore, something in these norms themselves, independently of the actions of even the international community, makes them peremptory. From this, it can be seen that there are two elements that affect the view on how and why—and therefore *when*—a particular peremptory norm can be said to form:

a) A norm is or becomes peremptory because of its own nature as a protection or expression of fundamental interests and values. As such, there is no reason to presuppose a specific act of state creating it at a definite point in time. The norm could legitimately be presumed to have existed—and been “in force”—for as long as the corresponding

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<sup>206</sup> ILC study on fragmentation, conclusion 32.

<sup>207</sup> ILC (State Responsibility, commentary) at 112, para 3.

<sup>208</sup> *Corfu Channel Case (United Kingdom v. Albania)*; *Merits*, 1949 I.C.J. (April 9) at p. 22.

international (communitarian) interest that it protects can be said to have existed in international law.

b) A norm is peremptory because it is designated such by the international community. Thus, it is possible that certain norms are deliberately created for important reasons while others necessarily exist as part of a community simply by their own nature.

Alternatively, regarding the ILC's interpretation of the VCLT's article 53, either: a) an ordinary norm already having the first element (appropriate substantive content) becomes peremptory only after it has satisfied the criterion of universal recognition; or (b) the satisfaction of this latter criterion only serves to clarify the status of the norm (that it is peremptory and not ordinary) so that once clarified, it can then be treated as having been *jus cogens* right from its beginning.

If the former, the norm—as a peremptory norm—will have effectively been created from the date of the universal recognition and cannot be “in force” on the critical date of the acts in question. But in the case of the latter, such recognition, while indeed having retroactive effects, would only be so in a limited, interpretive sense. It could not be construed as a simple application of a latter norm to events that pre-existed it (retroactivity). Rather, it would be seen as clarifying the proper legal character of an old principle and its proper relationship to relevant facts. Indeed, this is not much different from the approach taken in evolutionary interpretation of treaties.

In the *Jurisdictional Immunities* case, both the parties took for granted (and the court accepted) that the violation of *jus in bello* during World War II were violations of *jus cogens*. Thus, they allowed today's understanding that significant portions of IHL are of *jus cogens* status to affect the interpretation of treaty and customary norms from the 19<sup>th</sup> and early 20<sup>th</sup> century. It would seem therefore, that the point in time at which a peremptory norm receives universal recognition is immaterial once such recognition has been achieved. The old norm is thereafter treated as having been peremptory all along.

In addition, as Linderfalk notes, were article 53 to be taken as referring to a process by which the peremptory norm is created, it would be circular and illogical<sup>209</sup> because article 53 “assumes what remains to be established: the creation of *jus cogens*.”<sup>210</sup> That is to say, for states to accept and recognize that a norm is non-derogable, the norm must indeed be so at the time of the said recognition. If it is not, the recognition that it is non-derogable cannot occur or would be wrong if it occurred. Such acceptance and recognition cannot therefore be the constitutive act that forms the peremptory norm. Rather, when states recognize that a norm cannot be derogated from, “they do so because according to their judgment, international law does not permit derogations from (it).”<sup>211</sup> To call such an act creative is to take the position that the states are wrong in their judgment at the time they recognize the norm as a norm from which no derogation is permitted, as this approach necessarily presupposes the non-existence of the peremptory norm immediately prior to its “acceptance” as a norm from which no derogation is permitted.

Linderfalk explains that because of this highly-criticized feature of article 53, it cannot be taken as describing a process by which a peremptory norm is actually created. Instead, the article makes sense only if it is understood as describing a process of identification. The creation process must be looked for elsewhere.

Linderfalk argues that peremptory norms are created through the same murky process that creates customary international law. But again, the process he describes may very well be a process of mere identification—no more than the means by which “universal recognition” is achieved. Instead, and in light of the above discussion, it is argued in this paper that save for norms of *jus ad bellum* and other state-focused or sovereignty-protecting norms, it is impossible to identify any point in time in which a norm that is now recognized as peremptory was formed, especially in the area of humanitarian peremptory norms, saturated as they are with moral-ethical or value-based content as described above. These latter norms must simply be accepted as having been part of

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<sup>209</sup> Linderfalk U ‘The Creation of *Jus cogens* – Making Sense of Article 53 of the Vienna Convention’ (2011) 71 *ZaöRV* 359-378, at 359.

<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid.*

international law always, once they are identified as peremptory through the universal recognition process.

As said earlier, the ILC explanation of peremptory norms using both content and a recognition process may also mean that there are some norms that are peremptory due only to their substance (content), though identified through recognition, and there are norms that are indeed created through such a process of universal recognition. Indeed, article 53 defines peremptory norms as those “which can be *modified* only by a subsequent norm of general international law having the same character.” This shows that at least some peremptory norms can come to an end or become derogable where a conflict exists between two peremptory norms. Such norms are therefore temporally limited in their application and it is not possible to treat them as having formed, even implicitly, a part of international law *throughout*. Alternatively, article 53 might be interpreted as indicating that all peremptory norms, without exception, are essentially extinguishable by operation of a new peremptory norm. But as is argued below, this only makes sense with *some* peremptory norms, viewed in themselves and their role in international society, but not with all peremptory norms.

Indeed, part of the problem with article 53 seems to be the use of blanket terms and lack of nuance. Essentially, even norms prohibiting genocide and slavery are theoretically displaceable by some future peremptory norm. But this disturbing implication is impossible to reconcile with modern international law as seen in Khan’s comment that peremptory norms may indeed be timeless and that the prohibition of genocide is not foreseeably changeable under article 53.<sup>212</sup> He however does not accept this as true of *all* peremptory norms.<sup>213</sup> The “never again”<sup>214</sup> rhetoric that followed the atrocities of the 2<sup>nd</sup> World War and continued long after and the language of the trial courts at Nuremberg and other comments referred to in chapter 2, similarly highlight the presumption underlying much current legal discussions that such acts as slavery and genocide could

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<sup>212</sup> Khan AK (2003) *A Theory of Universal Democracy: Beyond the End of History*, MartinusNijhoff Publishers, 87.

<sup>213</sup> *Ibid.*

<sup>214</sup> Alkalaj S ‘Never Again?’ (1999) 23 *Fordham International Law Journal* 357.

never again be seen as legitimate in the future of law. For example, it is present in Kofi Annan's speech in which he explains that ensuring that genocide could never happen again was seen as the most important mission of the United Nations.<sup>215</sup> These objects and "missions" of the international order cannot be reconciled with a reading of the VCLT that leaves the same law open to possible legal genocide.

Neither is it foreseeable, also, how a peremptory norm such as the prohibition of genocide—the deliberate targeting of human groups and peoples for annihilation—could possibly come into conflict with an emergent future norm unless that emergent norm were the product of a radically different international order. Indeed, it would have to be an order built on values and principles directly opposed to those held as most unquestionable today.<sup>216</sup> Such an "order" would be fundamentally different, not just in the organizational or structural sense, but in the very essential ethics from which the system stems.<sup>217</sup> Indeed, in both Verdross's and Schwarzenberger's conflicting discussions on *jus cogens* above, an "order" such as this would not be a legal order at all, its membership consisting merely of outlaws or entities that are not essentially states (per Verdross's "essential tasks").

Such a state of affairs has no relationship whatsoever with present international law or the principle in article 53. It is thus unreasonable to claim that this implosion of legal order could possibly be contemplated by article 53 or any instrument of the present system. It must be concluded, instead, that there is an irreducible minimum to the degree of change that is possible to the value system of the international community.

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<sup>215</sup> United Nations Secretary-General Kofi Annan, Address Commemorating the Occasion of the Fiftieth Anniversary of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1998).

<sup>216</sup> The preamble of the Genocide Convention describes genocide as "a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world."

<sup>217</sup> Indeed, the very prospect of a conflict between any two *jus cogens* norms or the displacement of one by another seems so remote that it is reasonable to conclude that the only reason that such a possibility is contemplated in the Vienna Convention is that the content of *jus cogens* remains unsettled. It is left up to the community of states "as a whole" to "identify" which norms these are. Thus, the possibility cannot be eliminated that some of the norms settled upon in the future may bring about a conflict of some sort between peremptory norms. Never the less, the extent to which that is possible must not be presumed theoretically unlimited.

Indeed, the ILC's implicit classification of peremptory norms in the reference to the various protected interests ("states, their peoples and basic human values"<sup>218</sup>) shows that peremptory norms, being one group, are not necessarily uniform. Verdross also groups peremptory rules "created" for a humanitarian purpose on one hand and those concerned with the use of force on the other. In his grouping for the "humanitarian" peremptory norms, he refers to the ICJ's statement in its advisory opinion on genocide about instruments "adopted for a purely humanitarian or civilizing purpose."<sup>219</sup> There is no discussion on any difference in effects or reach of these norms among any of these authors' works, but this paper argues that such distinctions are logical.

For example, *jus ad bellum* seems a good candidate for such future modification as envisioned in article 53 of the VCLT, but only to a certain level. Concepts like "armed attack,"<sup>220</sup> "self-defence,"<sup>221</sup> "threats,"<sup>222</sup> as well as the UN collective-security system,<sup>223</sup> are potentially subject to some modification depending on future security needs and the international political arrangement that may then exist. Such trends have already been noted with the emergence of transnational terrorism and its relationship to non-international armed conflicts, especially in America's war with transnational non-state actors in Afghanistan after the events of 9/11. It has been suggested that the law has changed<sup>224</sup>—though in what sense, it cannot as yet be fully ascertained.<sup>225</sup> On the other

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<sup>218</sup> ILC (State Responsibility, commentary) at 112, para 3.

<sup>219</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. (May 28).

<sup>220</sup> UN Charter, article 51.

<sup>221</sup> *Ibid.*

<sup>222</sup> *Ibid.*, article 2 (4).

<sup>223</sup> *Ibid.*, articles 39—51 (Chapter VII).

<sup>224</sup> Tams JT 'The Use of Force against Terrorists' (2009) 20 *European Journal of International Law* 2, 359—397; He says, "in the course of the last two decades, the Charter regime has been re-adjusted, so as to permit forcible responses to terrorism under more lenient conditions."

<sup>225</sup> It may be in the definition of self-defense or in the laws of attribution by which a state may be held responsible for an armed attack (such as the attack on the World Trade Centre). Self-defense has traditionally been understood in a state-centric way. It's not only that states have the right to defend themselves from imminent threats, but also that they can do so only against aggressive states. It is suggested that since 9-11, it is no longer clear that states may not exercise this right against non-state entities like *Al-Qaeda*, even if doing so means making war in another state that has permitted use of its land to that entity.

hand, self-determination—at least in its “external” manifestation—is even today subjected to the territorial integrity of extant states.<sup>226</sup> But neither genocide, nor slavery, nor indeed torture is either subjected to other principles in any declaration or spoken of in terms that suggest their capacity for change or replacement as indicated possible in article 53.

It is the argument of this paper that, unlike *jus ad bellum* or even (external) self-determination, the humanitarian peremptory norms, having as they do, the human being and human populations as their immediate object of protection, are distinct or should be distinguished from other norms of similar status, in their reach and effects.

It is not that other peremptory norms, like *jus ad bellum* and external self-determination, are less fundamental. It is that they are tied to essentially changeable aspects of the international order, thus embodying more than the basic human values they are intended to secure. The entire law of *jus ad bellum*, for example, is state-focused, not just in the sense that states have primary duties and rights as they do in all international laws, but in the sense that the immediate object of protection of these particular peremptory norms is the state itself or the highest political sovereignty. This is so even though the actual interests proximately secured by them are the higher values of “international peace and security”,<sup>227</sup> and indeed, the very survival of civilization and of the human race.<sup>228</sup> Directly, however, the law governs inter-state relations at their most fundamental level, a level representing the necessary minimum principle—in the community’s judgment particularly following the lessons of the 2 World Wars—without which, states cannot peacefully co-exist.

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<sup>226</sup> *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* GA Res. 2625, 25 UN GAOR Supp. 18 122; 65 *AJIL* 243 (1971); “Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.”

<sup>227</sup> UN Charter, Preamble.

<sup>228</sup> *Ibid.*

Indeed it remains possible that the current political arrangement of international relations may undergo changes in this area, as noted above. For example, through increasing limits on the notion of sovereignty and possibly more centralization of the right to use force in international organs. Thus, it is possible that those higher or ultimate values now protected by the law of *jus ad bellum* may come to be protected through different laws in the future. However, it is not reasonable to conclude that these higher values themselves—peaceful co-existence and preventing unnecessary and widespread human suffering, for example—would themselves change.

Like these higher values, the human being—individually or in groups—who is the immediate object of protection of the humanitarian peremptory norms is not subject to change. To assert that the peremptory norms that prohibit the human being's direct injury are somehow capable of being set aside in future would therefore require asserting that the need to protect his existence at a basic level is itself subject to change. But as argued above from both Verdross and Schwarzenberger, a system with such a basis would not be recognizable as a legal order at all. If so, then because it is not foreseeable that these norms should ever cease to be part of a prospective international legal order, there is good reason to presume that they have been part of the international order in the past as well, at least implicitly, for they are not extricable from that legal order.

Indeed, it might be argued that allowing peremptory norms to apply to the past carries the great risk of opening up a floodgate and causing a crisis in the present legal system. This was an argument often made in the years of the doctrinal debate regarding state immunity and *jus cogens*. In particular, there is the risk that it might spark claims based on all manner of historical grievances stretching back centuries. In the area of *jus ad bellum* and external self-determination, this might be particularly problematic as these norms are inextricably linked to numerous sovereign titles held by states today. However, as discussed above, there are good reasons for distinguishing the purely humanitarian peremptory norms from those that are concerned—at least directly—only with sovereignty or the state itself.



#### **IV. Conclusion**

Neither the *jus cogens* concept nor individual peremptory norms are dependent on the VCLT for their temporal scope of application. In addition, individual peremptory norms of a purely humanitarian nature, of which torture is a part, cannot be placed in specific periods of the history of international law. This is owing: a) to their moral nature and b) to the phenomenon described by Parker & Neylon above, showing that *jus cogens* is more implicit than explicit until a gross violation forces positive acts by states. Thus, the prohibition of torture can be said to have been both “valid and applicable” to the events described in chapter one. This complements the discussion in chapter three and leads to the conclusion that a normative conflict is demonstrable between humanitarian peremptory norms and inter-temporal law as understood in positivist terms, such that the latter must yield to the former.

## CHAPTER FIVE: THE LEGITIMACY OF APPLYING *JUS COGENS* TO THE PAST—ARGUMENTS FROM EVOLUTIONARY INTERPRETATION OF TREATIES AND THE THEORY OF COMMUNITY INTERESTS.

### I. “Evolutionary interpretation”

Even granting—according to some of the arguments explored in chapter four—that peremptory norms are belated developments of international law, it would seem that the evolutionary interpretation of treaties is a phenomenon that belies any rigid approach to inter-temporality: that is, the attitude that regards international law’s relationship with past facts as frozen in time and static. The facts are indeed frozen in time, yet this does not mean that their interpretation and relationship with the law has to be. The facts remain what they are, but per the second “leg” of Max Huber’s doctrine, the court is permitted to give legal significance to developments of law that occur subsequent to the “juridical acts” of the first “leg” of the principle. Especially with human rights treaties, standards of the law contemporary with the dispute or its determination are routinely employed to interpret treaties in disputes that occurred before the development of these standards in general international law. As the advisory opinion in the *Namibia case* ruled,

“an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of interpretation”<sup>229</sup>

This malleability of the law through time is expressed by Elias.<sup>230</sup> He makes clear that the doctrine of inter-temporal law is one of the most important products of positivism in international law, ever since sovereignty became the cornerstone of international relations after the treaty of Westphalia. Therefore, inter-temporal law is an expression of the idea that the state is the source and guarantor of all law. With this background in mind and after an analysis of the *Island of Palmas case*, he finds that,

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<sup>229</sup> *Namibia case* at 16.

<sup>230</sup> Elias at 291.

“the doctrine of inter-temporal law would seem to have been based upon a view of international law as a dynamic legal system and not merely as a static interpretation of rules.”<sup>231</sup>

More recently, Judge Al-Khasanweh has said of inter-temporality

“we are not faced with a simple well-defined rule capable of automatic application, but rather with a perplexing idea that was incapable of finding a place in the 1969 Vienna Convention. Nor has the concept of inter-temporal law found support in judicial decisions, where it has been often overcome with the aid of a belated discovery of the intention of the parties as was the case in the Aegean Sea case, or by reading the provisions of modern law into the treaty, which was the approach that the Court took in its Advisory Opinion on Namibia...”<sup>232</sup>

Per Mkarczyk,

“The concept of Inter-temporal Law, imaginatively updated and applied today, seems comprehensive enough as a doctrinal-legal category, to encompass modern evolutionary approaches to the interpretation of past history and their application through the judicial process, to the novation of old legal categories through the techniques of progressive, generic interpretation.”<sup>233</sup>

As can be seen, a practice of applying law retrospectively and without the requirement of additional explicit approval of the parties is already in some way established in international law. Modern law is applied to treaties that were consented to in the past, in disputes arising from facts that occurred subsequently thereafter but before the

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<sup>231</sup> *Ibid.*

<sup>232</sup> *Bakassi case* at 502, para 15.

<sup>233</sup> Makarczyk J (1984) *Essays in International Law in Honour of Judge Manfred Lachs* BRILL MartinusNijhoff Publishers, at 199.

development of general international law in its modern form. The parties could not possibly have given prior consent to them. If treaty terms—wherein state intent is so much clearer in comparison to other expressions of state-consent—are capable of such reinterpretation through the eyes of modern norms and without there being a need for fresh expressions of state consent, why should it be presumed that customary international law and general principles that have since developed into peremptory norms should not be equally flexible? There is no good reason to assume so.

Moreover, peremptory norms impose themselves on all states without regard to their agreement. Even a persistent objector would not be exempt. Therefore, a justification for a strict application of inter-temporality in the law of state responsibility (for violations of peremptory norms) that highlights the lack of consent on the state concerned is unsupportable. For in that regard, the position of the state in the past and in the present vis-à-vis the peremptory norm remains unchanged—in neither case is its consent required. Indeed, the only substantial difference between the two might be that of notice.

Thus, it might be argued that Great Britain in 1952 had no notice that committing the acts described in chapter one was contrary to international law in general and to a peremptory norm of international law in particular, whereas the Britain of today is clearly well-informed regarding its international responsibilities. This is the view that regards inter-temporality from the perspective of the subject of law, and is all about justice. It relies on the idea that the acts in question were “innocently” committed. This leads to a discussion on the different perspectives or interests involved in such a dispute.

## **II. A matter of competing interests**

When a tribunal applies inter-temporal law, it places itself in the place of a tribunal of the past and essentially asks itself what the past courts would have decided had they had an opportunity to examine the matter in their own time. The question that has been asked in this paper so far is whether a tribunal with the benefit of the knowledge of clearly enunciated fundamental values of contemporary international society, can afford to set

this knowledge aside and assume the ignorance of the hypothetically prior court, and whether it can do so without betraying these now-clear, fundamental values. Thus, such examination has been done from the point of view of the tribunal dealing with a case in the present context of basic values and legal principles held fundamental in the current legal community. It involves also the point of view of the present international community which cannot afford—through the tribunal—to make declarations that contradict its sacred values. Thus, the discussion has generally assumed the “communitarian interests” perspective, and is the view expressed by Lammasch and seems to have been that of the Inter-American Court in the *Aloeboetoe case* and Judge Tanaka in *South West Africa*. In short, it is the “community of values”<sup>234</sup> approach that has prevailed in this paper thus far.

In the “community of values” approach, the Court’s solution would involve weighing the ultimate interests of the community that are implicated and not simply opting for a uniform approach across the board. As Judges Khasanweh and Tanaka’s views discussed in chapter two show, inter-temporality protects all kinds of interests—from the very important to the relatively trivial and even the positively unconscionable. They cannot all be treated equally by a rigid application of the principle of inter-temporal law, especially where the community as a whole has a competing interest in the form of a protected human value.

As was seen in chapter three, a normative conflict can be demonstrated—to an extent—at that point in time that a tribunal rules on a past act that contradicts presently recognized peremptory norms. From the community interests perspective, the onus is on the party arguing for the setting aside of a peremptory norm to demonstrate an equally important community interest that justifies such an action. This is, as explained by Hernández, the principle of *par in par imperium non habet*—that is, resolving conflict between principles

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<sup>234</sup> De Waart PJIM, Denters EMG & Schrijver N (1998) *Reflections on International Law from the Low Countries: In Honour of Paul De Waart*, MartinusNijhoff Publishers, 463. “Community of values” are presented as “universal or quasi-universal values”

using “a balancing test, taking into consideration the proportionality and legitimacy of the purpose”<sup>235</sup> of the two.

Such interests include, for example, the stability of current sovereign titles and the need for maintenance of peaceful co-existence through the security of borders and titles, coupled with the changing law of *jus ad bellum*. This may justify setting aside *jus ad bellum* and external self-determination. However, nothing can justify the same for purely humanitarian peremptory norms. In other words, no threats to vital interests of present international community “as a whole” are endangered by application of the latter norms to past events.

But, as seen above, the “community interests” perspective is certainly not the only perspective through which this matter can be legitimately examined. There are also:

a) The perspective of the subject of law described briefly above with reference to “notice” of the law: a question of justice. However, regarding the *Mau Mau* position, Britain could hardly be said to be innocent regarding its knowledge of the grave immorality of the acts involved. This is so considering the point of time in history in which these acts were committed. In its own legal system, Britain had long banned use of torture<sup>236</sup> and had signed onto (though not yet become bound by) international (and one regional) instruments that prohibited torture. In any case, there could hardly be any injustice involved in repairing harm actually done by the state in question, merely because positive law was not clear at the time about international law banning the same acts that Britain considered illegal within its own territory. Moreover, the common law principle of strict liability<sup>237</sup> shows that it is sometimes necessary and perfectly appropriate to hold a subject of law responsible for a wrong committed without his appreciation of its illegality.

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<sup>235</sup> Hernández (Reluctant Guardian) at 44.

<sup>236</sup> Rudolph H (1984) *Security, Terrorism, and Torture: Detainees' Rights in South Africa and Israel: a Comparative Study*, Juta & Co, 170—182.

<sup>237</sup> “Liability without fault”; Black’s Law Dictionary, 7<sup>th</sup> Ed, at 926.

b) The perspective of the legislature: This is in international law terms, from the point of view of the state as a source of law, and it involves a discussion of the conception of international law in general. In this case, positivism is the protected interest. As argued above, *jus cogens* simply cannot be made subject to positivism in any strict or absolute sense.

c) The factual/historical view-point that examines the matter as an issue of fact—the law as it was. This does not concern itself with the interests of either the present international community or individuals and states, but assumes a somewhat detached position. However, bearing in mind that the “historical fact” under examination is the law, the question “what is law” is implicated in the first place, which was largely the discussion in chapter four.

In fact, rigid application of only the first “leg” of Max Huber’s principle is the common practice among many writers. Such a perspective involves a combination of the two latter view-points explained above: state consent and objective historical fact. It is assumed that having *jus cogens* trump inter-temporality is circular (and anachronistic) because time in the human experience is linear and unidirectional. The past remains static, and “states cannot go back in time to bring their actions into conformity with the norm.”<sup>238</sup> Therefore, when a law seems to say that the past was other than it was (when viewed from the present), or when it has people and states “violating” non-existent international laws, it pits itself against reality and is vulnerable to the charge that it is illogical.

However, it seems that to arrive at the conclusion that such is the case whenever inter-temporal law fails to be applied to the past in the area of state responsibility, one would already be presuming : a) That a finding of responsibility necessarily involves making a factual statement about the *opinio juris* of the state concerned at the time of the event—or indeed of the *opinio juris* of other states at that time; b) That only clearly stated positive rules of custom and treaty count as part of international law which, again, was disposed of in chapter four.

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<sup>238</sup> Criddle & Fox-Decent at 361—362.

However, exactly what meaning is given to a finding of responsibility depends on the perspective one takes. The tribunal need not be saying, “State x violated the 1980 Convention in 1952;” nor need it say, “State x violated in 1952 the custom that developed and crystallized in the 1960s.” Instead, the court may simply be recognizing that certain past immoral actions of a particular gravity (recognized as gravely immoral, quite often, in both their own historical context and when viewed through the prism of present values) are worthy of legal redress and reparation in accordance with today’s positive rules and yesterday’s unmistakable moral values. In other words, the finding gives legal effect to certain moral principles already recognized in the past. This may appear extra-legal, but it accords to the very nature of *jus cogens*, discussed in chapter four, a term which itself is described as “extra-legal”.<sup>239</sup> In other words, such a finding may simply be a statement that some old moral principles are part of international law, the lack of state consent in their regard notwithstanding. There is no reason to think this illogical.

Ultimately, the different perspectives present different priorities and interests whose protection (by law) is sought. Any argument made presuming either one stems directly from the author’s own conception of international law. Indeed, as is argued above under “evolutionary interpretation”, inter-temporality itself, understood in its full significance (including its “second leg” as explained by Max Huber), is simply a process of weighing the different interests involved, particularly the need for the stability of the law against the need for the development of the law. Indeed, Judge Al-Khasanweh’s above-referenced description of inter-temporality as a “perplexing idea” and not “a simple, well-defined rule capable of automatic application”—especially regarding humanitarian peremptory norms—aptly captures this reality.

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<sup>239</sup> Hernández at 25—26, “The extra-legal dimension of peremptory norms”.



## CHAPTER SIX: CONCLUSION

The superiority of *jus cogens* in international law should be reflected in the application of the inter-temporal principle, as indeed it should in the application of all other inferior norms and principles wherever relevant subject matter is in issue. Indeed, an apparent normative conflict between *jus cogens* and inter-temporal law has been demonstrated using: a) the principles for the resolution of normative conflicts laid forth in the conclusions of the ILC work study on the problem of fragmentation in international law; and b) the principles applied in the *Jurisdictional Immunities* case. However, a normative conflict cannot be definitively concluded without establishing, independently, the temporal scope of *jus cogens* norms over the acts in question: if *jus cogens* norms begin at an identifiable point in time and are prospective in nature, no over-lap and thus no contradiction can be spoken of.

The discussion therefore looked at the question of the origins of the *jus cogens* concept and norms in basic human morality, beyond temporally identifiable state acts. The charge of anachronism was answered in several ways.

a) Firstly, it assumes that all *jus cogens* norms (and the concept itself) is based on state authority and ignores the nature of the concept as basic morality—a fact that limits the extent to which the existence of individual peremptory norms is directly attributable to temporally-identifiable acts of states. In this regard, the difficulties of the definition in article 53 of the Vienna Convention were discussed. While the article allows some room for the idea of a deliberate creation of peremptory norms, the nature of humanitarian peremptory norms is such that they cannot be presumed to be either limited in time or capable of being replaced in the future. Instead, the recognizing acts of the community of states must be regarded as no more than an identification process. Once such a norm is identified, it must not then be treated as if it was ever other than a peremptory norm.

b) Even if a humanitarian peremptory norm can be said to be created by a temporally identifiable act of a group of states (even the “international community as a whole”), it

has been seen that there is no threat to justice, law, or truth in applying humanitarian peremptory norms in the area of state responsibility. While this claim of compatibility with objective “truth” may be challenged, such a challenge would presume only one view of a judicial finding of responsibility. But as argued in chapter five, the court need not state factual errors in order to uphold presently recognized norms, and the analogy of the common law principle of strict liability illustrates this.

While the *Mau Mau* claims have been partly settled, and will likely remain within British municipal law, there is a small chance that similar cases may wind up before an international tribunal—either the European Court (in which temporal jurisdiction of the court itself and the territorial scope of the ECHR present a challenge) or the International Court, should states take up the cause on behalf of the victims. In the likely event that contemporaneous positive law offers little foundation for a legal claim, it is a worthy endeavour to re-examine the role of *jus cogens* in such suits, should they ever need to be determined on the basis of substantive international law. It has been the argument of this thesis that such a legal claim is indeed possible.

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